NO. 85-468

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH BOARDMAN and HENRY BOARDMAN,
Petitioners

versus

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Petition for Writ of Certiorari

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

I.

Where federal jurisdiction has been invoked to decide a conflict of laws question, is a determination of the sufficiency of contacts by the trial court a factual finding which cannot be set aside without a declaration that such factual findings are clearly erroneous, and absent such a declaration by a reviewing court, has there been a deprivation of due process of law? Stated differently, does due process of law require an appellate court to apply the clearly erroneous rule to factual findings of a trial court?

II.

In a conflict of laws case, has there been a violation of due process of law and of the Full Faith and Credit Clause where the substantive law selected by the reviewing court is the law of the state with insignificant contact or an insignificant aggregation of contacts with the parties and the subject matter of the litigation?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH BOARDMAN AND HENRY BOARDMAN,
Petitioners

versus

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

On October 25, 1982, a Memorandum Opinion was entered by the United States District Court for the Southern District of Mississippi in favor of the Petitioners. A copy of said Opinion is printed herein as Appendix A. An Interlocutory Appeal was filed by the Respondent in the United States Court of Appeals, Fifth Circuit, from this Opinion.

On September 14, 1984, the United States Court of Appeals, Fifth Circuit, directed the parties to develop a common certificate of the issues. *Boardman v. United Services Automobile Association*, 742 F.2d 847 (5th Cir. 1984). A copy of this Opinion is printed herein as Appendix B.

On October 23, 1984, the case was certified to the Mississippi Supreme Court. *Boardman v. United Services Automobile Association*, 763 F.2d 663 (5th Cir. 1984). A copy of this Opinion is printed herein as Appendix C.

By decision dated May 22, 1985, the Mississippi Supreme Court answered the certified questions. *Boardman v. United Services Automobile Association*, 470 So.2d 1024 (Miss. 1985). A copy of this decision is printed herein as Appendix D.

On August 19, 1985, the United States Court of Appeals, Fifth Circuit, entered an Opinion adopting the Opinion of the Mississippi Supreme Court, and directed the District Court to enter Judgment in accordance with the Opinion. A copy of said Opinion is printed herein as Appendix E.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals, Fifth Circuit, was entered on August 19, 1985, and in effect incorporated the Opinion of the Mississippi Supreme Court dated May 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 and 1257 since a right has been especially set up and claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV, SECTION 1

". . . .nor shall any state deprive any person of life, liberty, or property without due process of law. . . . "

ARTICLE IV, SECTION 1

"Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

FEDERAL RULE INVOLVED

Federal Rules of Civil Procedure Rule 52(a)

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of the master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings

of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT OF THE CASE

The Petitioner Joseph Boardman, age 19, entered Mississippi State University at Starkville, Mississippi during the fall and spring semesters of the 1978-1979 term. In May of 1979, Joseph Boardman came to Gulfport, Mississippi directly from school to work for his paternal uncle who owns a concrete business in Gulfport, Mississippi. During the fall and spring semesters of 1978-1979, the Petitioner Joseph Boardman was permitted by his father, the Petitioner Colonel Henry Boardman, to operate a Ford Pinto vehicle which was insured under a policy of insurance issued by the Respondent United Services Automobile Association in the name of the Petitioner, Colonel Henry Boardman. During this time period, Colonel Henry Boardman was temporarily stationed with the United States Air Force in the State of Nebraska, and the insurance policy was mailed to Colonel Boardman in Nebraska.

The Petitioner Joseph Boardman drove the Ford Pinto to Gulfport, Mississippi, and operated this vehicle until his father, the Petitioner Colonel Henry Boardman, came to Mississippi and recovered the vehicle in order to deliver it to his daughters in Cincinnati, Ohio. Thereafter, on June 14, 1979, the Petitioner Henry Boardman requested the Respondent remove the Petitioner Joseph Boardman as a named insured on his automobile insurance policy. Joseph Boardman, however, remained insured for purposes of uninsured motorist coverage as he was a member of the household of Henry Boardman.

On June 20, 1979, Joseph Boardman purchased a Chevrolet Caprice automobile in Gulfport, Mississippi. An application was made by Joseph Boardman for title, and additionally he purchased a Mississippi license tag for the Chevrolet Caprice automobile. After Joseph Boardman purchased

this particular automobile there was a discussion with his father concerning having the Chevrolet Caprice vehicle insured with the Respondent, but no insurance was actually purchased prior to the subject accident.

On July 8, 1979, the Petitioner Joseph Boardman, was involved in an automobile accident caused by the negligence of an uninsured motorist. As a result of this accident, Joseph Boardman has lost his right eye, suffered multiple facial fractures, chipped his right knee cap, severed tendons and fractured bones in his right foot.

This case initially involved a claim for uninsured motorist coverage under the terms of the policy of insurance existing between the Petitioners and the Respondent. The controversy centers around what has been referred to as the "owned-vehicle" exclusion as applied to the Chevrolet Caprice vehicle. The relevance of the "owned-vehicle" exclusion is that this particular clause has been declared invalid under Mississippi law as being adverse to public policy, while under Nebraska law, this particular exclusion has been upheld.

On May 19, 1981, a Complaint was filed by the Petitioners in the United States District Court for the Southern District of Mississippi under the diversity jurisdiction of the federal court. 28 USC § 1332. On June 11, 1981, the Respondent filed an Answer. Various discovery proceedings were conducted by the parties from June 15, 1981 through July 31, 1981. On August 5, 1981, the Petitioners filed a Motion for Partial Summary Judgment, and on September 4, 1981, a Cross-Motion for Summary Judgment was filed by the Respondent. Essentially, both parties requested the United States District Court to make a determination as to the duties and obligations existing under the contract of automobile insurance existing between the parties.

On October 23, 1982, the District Court filed a Memorandum Opinion (Appendix A), and on November 1, 1982 a Judgment was entered granting the Petitioners' Motion for Partial Summary Judgment and denying the Respondent's Motion for Summary Judgment.

On January 1, 1983, an Amended Judgment was filed wherein the parties agreed that the issues were final as to liability and damages and leave was granted for an interlocutory appeal. The appeal was initially denied; however, on Petition for Rehearing granted May 23, 1983, the United States Court of Appeals for the Fifth Circuit granted the interlocutory appeal.

This is a conflict of laws case, and the Respondent United Services Automobile Association maintained before the United States District Court and before the United States Court of Appeals, Fifth Circuit, that Nebraska law should be applied in construction of the uninsured motorist coverages under the subject policy, because Nebraska law upholds the "owned-vehicle" exclusionary clause. *Herrick v. Liberty Mutual*, 274 N.W.2d 147 (Nebraska 1979).

The Respondent contends that since the policy of insurance was issued in Nebraska while the Petitioner Colonel Henry Boardman was temporarily stationed in that State, and because the Petitioner Joseph Boardman purchased a Chevrolet Caprice automobile in Mississippi, that the automobile was an "owned-vehicle" not listed on the insurance policy, and therefore would be excluded under the uninsured motorists provisions of the policy.

Contrary to this position, the Petitioners seek coverage and argue that Mississippi law should be applied in construing the insurance policy. Mississippi law condemns the "owned-vehicle" exclusion clause. *Lowery v. State Farm Mutual*

Automobile Insurance, 285 So.2d 767 (Miss. 1973).

In a detailed factual finding, the District Court in its Opinion dated October 25, 1982, found in favor of the Petitioners and applied Mississippi law to the construction of the insurance agreement existing between the parties. The District Court thus afforded the Petitioner Joseph Boardman coverage under the uninsured motorist provisions fo the insurance contract.

The Respondent filed an appeal to the United States Court of Appeals, Fifth Circuit, and on September 14, 1984, the Court of Appeals requested the parties develop a common certificate of issues. On October 23, 1984, the Court of Appeals certified the case to the Mississippi Supreme Court, and on May 22, 1985, the Mississippi Supreme Court answered the certified questions and held Nebraska law governed the construction of the insurance policy. The exclusionary clause of the Respondent's policy became effective, and therefore there is no uninsured motorists coverage for the injuries suffered by the Petitioner Joseph Boardman.

The decision of the Mississippi Supreme Court dated May 22, 1985, and adopted by the Court of Appeals on August 19, 1985, has engendered Constitutional issues to be reviewed by this Court. Particularly, the Mississippi Supreme Court's application of Nebraska law to the substantive issues of this litigation is violative of the Full Faith and Credit Clause (Article IV § 1) and the due process mandates of the Fourteenth Amendment to the United States Constitution. The Opinion of the Mississippi Supreme Court did not declare the District Court's analysis of the center of gravity test to be clearly erroneous under Rule 52(a), but nevertheless relinquished the Petitioners to the inequities of Nebraska law. The Opinion is in contradiction

to the teachings of the United States Supreme Court cases of *Homes Insurance Company v. Dick*, 281 US 397, 74 L.Ed 926, 50 S.Ct. 338 (1930), and *John Hancock Mutual Life Insurance Company v. Yates*, 299 US 178, 81 L.Ed. 106, 57 S.Ct 129 (1936) which hold that if a state has only insignificant contacts with parties and the occurrence or transaction, application of such state's law is unconstitutional.

ARGUMENT

I.

DUE PROCESS OF LAW REQUIRES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE BE STRICTLY CONSTRUED AND THE TRIAL COURT'S DETERMINATION AS TO THE MATTER OF SUFFICIENCY OF CONTACTS NECESSARY FOR THE CENTER OF GRAVITY TEST IS A FACTUAL FINDING WHICH CANNOT BE SET ASIDE WITHOUT A DECLARATION BY REVIEWING COURT THAT SUCH FACTUAL FINDING IS CLEARLY ERRONEOUS IN ACCORDANCE WITH RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 52(a) of the Federal Rules of Civil Procedure and the decisions of this Court require the affirmance of the factual findings of the District Court unless such findings are declared to be clearly erroneous by the reviewing court.

Except in matters governed by federal law, when a federal court's jurisdiction is predicated upon the diversity of citizenship of the parties, the federal court must apply the substantive law of the state in which it is sitting. *Erie R. R.*

Co. v. Tompkins, 304 US 64, 58 S Ct 817, 82 L Ed 1188 (1938); *Shirey v. Louisville & Nashville R. R. Co.*, 327 F.2d 549 (5th Cir. 1964). If, in a diversity case, the federal court is required to construe an insurance contract, the federal court will apply applicable state law. *Ruhlin v. New York Life Ins. Co.*, 304 US 202, 58 S Ct 860, 82 L Ed 1290 (1938). When there is a question as to which state law should be applied, the federal court must follow a conflict of laws rule which conforms to those prevailing in the state in which it sits; viz, the conflict of laws rules of the state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 US 487, 496, 61 S Ct 1020, 85 L Ed 1477, 1480 (1941). The purpose of applying the state law of the forum is to assure equal administration of justice in coordinate state and federal courts. Ibid. See also *Sampson v. Channell*, 110 F.2d 754 (1st Cir.) cert. denied; 310 US 650, 60 S Ct 1099, 84 L Ed 1415 (1940).

Under Mississippi law, the center of gravity test is applicable and the foundation of this legal test is the determination of the sufficiency of contacts which is clearly a factual finding.

The United States District Court clearly identified the sufficient contacts the Petitioners maintained with the State of Mississippi so as to apply Mississippi law in regard to the insurance contract subject of this litigation.

On certification, the Mississippi Supreme Court rejected the United States District Court's Opinion, and as related above, the United States Court of Appeals, Fifth Circuit, adopted the Opinion of the Mississippi Supreme Court. No reviewing court has ever determined that the United States District Court for the Southern District of Mississippi was clearly erroneous in any finding of fact.

The center of gravity concept was approved in *Mitchell v. Craft*, 211 So.2d 509 (Miss. 1969), and this test draws a determination as to the sufficiency of contacts with the forum state in a conflict of laws case.

Again, the United States District Court for the Southern District of Mississippi reviewed all of the facts and made a factual finding that there was a sufficient aggregation of contacts so as to apply Mississippi law in interpreting the subject insurance contract.

This Court has recognized that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure applies broadly to all categories of factual findings. In *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 US 273, 72 L.Ed. 2d 66, 102 S Ct 1781 (1982), this Court declared that Rule 52 does not make exceptions or attempt to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept the District Court's findings unless they are erroneous. This Court stated in *Pullman* that Rule 52 does not divide facts into categories, and that in particular, Rule 52 does not divide findings of fact to those which deal with ultimate facts and those which deal with subsidiary facts.

In *Rogers v. Lodge*, 71 L Ed 1012, 102 S Ct 3272 (1982), this Court underlined the importance a reviewing Court must give a District Court's findings of fact. Rule 52 broadly requires the findings of fact not be set aside unless clearly erroneous. *Commissioner v. Duberstein*, 363 US 278, 4 L Ed 2d 1218, 80 S Ct 1190 (1960), emphasizes that Rule 52(a) applies not only to the District Court's findings of fact, but also to factual inferences.

In *Sumrall v. Resolute Ins. Co.*, 377 F.2d 671 (5th Cir. 1967), the United States Court of Appeals, Fifth Circuit,

stated that the clearly erroneous rule prevents any possibility for reversal where there is support in the record for factual findings of the District Court.

In this particular case, there has been a denial of due process of law as the reviewing court never addressed the clearly erroneous rule.

II.

THE ADOPTION OF THE OPINION OF THE MISSISSIPPI SUPREME COURT BY THE UNITED STATES COURT OF APPEALS IS VIOLATIVE OF THE FULL FAITH AND CREDIT CLAUSE AND IS A DENIAL OF DUE PROCESS OF LAW PROVIDED BY THE FOURTEENTH AMENDMENT.

Approximately fifty years ago, this Court held in two separate cases that if a state has only insignificant contacts with the parties and the occurrence or transaction, then application of such state's law is unconstitutional. *Homes Insurance Company v. Dick*, 281 US 397, 74 L Ed 926, 50 S Ct 338 (1930). *John Hancock Mutual Life Insurance Company v. Yates*, 299 US 178, 81 L Ed 106, 57 S Ct 129 (1936).

Home Ins. Co. v. Dick concerned an insurance policy which has been issued in the Country of Mexico by a Mexican insurer to a Mexican citizen, covering presumably a Mexican risk. The subject policy was later assigned to a Mr. Dick, who was domiciled in Mexico, although he remained a nominal permanent resident of the State of Texas. The subject policy restricted coverage to losses occurring in certain waters of the Country of Mexico. The loss Mr. Dick

contended was actionable under the policy occurred in Mexican waters. The claim was denied, and Mr. Dick brought suit in Texas against a New York reinsurer. Neither the Mexican insurer, nor the New York reinsurer had any connection with the State of Texas. This Court held that application of Texas law to void the insurance contract's limitation of action clause violated due process.

The constitutional questions were also discussed in *John Hancock Mutual Life Insurance Company v. Yates.* In this case, the insurer, a Massachusetts corporation, issued a contract of life insurance on a New York resident. The particular life insurance contract was applied for, issued, and delivered in the State of New York where the insured and his wife resided. After the insured died in New York, his wife moved to Georgia and brought suit on the policy in Georgia. Under Georgia law, the jury was permitted to take into account certain oral modifications when determining whether or not the life insurance policy application contained material misrepresentations. Under New York law, such misrepresentations were to be evaluated solely on the basis of the written application. The Georgia Court applied Georgia law. This Court reversed, finding the application of Georgia law to be unconstitutional.

Home Ins. Co. v. Dick and *John Hancock Mutual Life Ins. Co. v. Yates* were both discussed in the recent case of *Allstate Ins. Co. v. Lavina Hague*, 449 US 302, 66 L.Ed.2d 521, 101 S.Ct. 633 (1981). In *Hague*, the Appellee's husband died of injuries suffered when a motorcycle on which he was riding as a passenger was struck by an automobile. The accident occurred in the State of Wisconsin near the Minnesota border. The operators of both the motorcycle and the automobile were Wisconsin residents, as was the Appellee's decedent. The decedent was, however, employed in Minnesota and commuted daily to work in that state from

Wisconsin. Neither the motorcycle operator nor the driver of the automobile which struck the motorcycle carried any valid insurance, but the decedent held a policy issued by Allstate Insurance Company covering three automobiles owned by the decedent, and which contained uninsured motorist coverage. The policy limited such uninsured motorist coverage to $15,000 for each vehicle. After the accident, the decedent's wife moved to, and became a resident of Minnesota, and brought action in the Minnesota Court seeking a declaration under Minnesota law that the $15,000 uninsured motorist coverage on each of the three vehicles could be stacked to provide a total coverage of $45,000. Allstate defended on the basis that whether or not the three uninsured motorist coverages should be stacked should be determined by Wisconsin law, since the insurance policy was delivered in Wisconsin, the accident occurred there, and all persons involved were Wisconsin residents at the time of the accident.

Wisconsin law disallowed stacking; Minnesota permitted stacking. The Minnesota Supreme Court affirmed the lower Minnesota Court, and found that Minnesota law should be applied in the case. The decision of the Minnesota Supreme Court was affirmed by this Court which concluded that Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of Minnesota law is neither arbitrary nor fundamentally unfair, and did not violate the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause.

One important aspect of *Hague* is that this Court concluded that an important consideration in determining the choice of law question was the fact that the Appellee Hague became a Minnesota resident prior to the institution of litigation. The Court concluded that the change of residence

by the Appellee, and her appointment as representative of her husband's estate constituted a Minnesota contact which gave Minnesota an interest in the Appellee's recovery. The Court also noted and discussed *Yates* to the effect that a post-occurrence change of residence to the forum state may be sufficient in and of itself to confer power on the forum state to choose its law, and the Supreme Court further concluded that *Yates* holds that such a change of residence is not irrelevant.

In the case at bar, the Mississippi Supreme Court completely disregarded the fact that the Petitioner Henry Boardman moved back to his permanent home, Mississippi, so that at the time of filing of litigation, both Petitioners, Henry Boardman and his son, Joseph Boardman, resided in the State of Mississippi. This is one of the contacts with the State of Mississippi that the District Court considered, and it is certainly a proper consideration under the teachings of *Hague* and *Yates*.

In a concurring Opinion by Justice Stevens in *Hague* it was noted that contracting parties can make their expectations explicit by providing in their contract either that the law of a particular jurisdiction shall govern questions of contract interpretation, or that a particular or subsequent rule, for instance, "stacking", shall or shall not apply. Justice Stevens also noted that the insurance policy in *Hague* provided for coverage for accidents throughout the United States, and thus, at the time of contracting, the parties in *Hague* certainly could have anticipated the laws of other states other than Wisconsin could govern particular claims arising under the policy. By virtue of doing business in Minnesota, Allstate Insurance Company was aware that it could be sued in Minnesota Courts. Therefore, the decision of the Minnesota Courts to apply the law of the forum in *Hague* did not frustrate the reasonable

expectations of the contracting parties.

In the present case, the Mississippi Supreme Court has applied Nebraska law when to do so would be unconstitutional as the parties in the present iitigation had only insignificant contact with the State of Nebraska.

Unbelievably, the decision of the Mississippi Supreme Court continually made reference to the fact that the insurance contract was issued in Nebraska through United Services Automobile Association's agent in Nebraska. This is certainly not accurate, and amounts to an improper addition of another contact to the State of Nebraska, and is violative of the parties Statement of Facts in the Statement of the Case issued by the Court of Appeals, Fifth Circuit, in its Opinion certifying questions to the Mississippi Supreme Court.

The Respondent United Services Automobile Association is a reciprocal inter-insurance exchange who issues its policies from San Antonio, Texas, and limits its policyholders to active or retired military personnel. United Services Automobile Association does not have "agents". The Mississippi Supreme Court made an erroneous conclusion that the insurance contract was issued in Nebraska through United Services Automobile Association's "agent" in Nebraska, and is certainly in complete contradiction to the agreed upon facts in this case.

The constitutional problems engendered by application of Nebraska law are magnified by the totally insignificant contacts the State of Nebraska has with the parties of this case and the occurrence or transaction. Particularly, the only contact Nebraska has with the present case is that the insurance policy was issued to the Petitioner Henry Boardman in the State of Nebraska while Henry Boardman

was stationed as a temporary resident of the State of Nebraska while he was a member of the United States Air Force.

The District Court in its Opinion outlined the significant relationships or factors relating to the claim for uninsured motorist coverage in the State of Mississippi. Specifically, the following constitute the significant contacts of the State of Mississippi which the District Court properly recognized:

> "(a) Shortly before the accident, the Petitioner Joseph Boardman had been a full time student at Mississippi State University;
> (b) At the time of the accident, Joseph Boardman was temporarily residing in Gulfport, Mississippi, working to earn money so that he could return to Mississippi State University in the fall;
> (c) Approximately a week before the accident, Joseph Boardman had purchased a vehicle in the State of Mississippi and further purchased a Mississippi tag for said vehicle;
> (d) The accident subject of this litigation occurred in Gulfport, Mississippi;
> (e) All witnesses to the accident reside in the State of Mississippi;
> (f) At the time of the filing of this litigation, Petitioner Colonel Henry Boardman moved back to the State of Mississippi, so at the time of filing, both Petitioners resided in the State of Mississippi;
> (g) At the time of the accident, the Respondent United Services Automobile Association was qualified to do business in the State of Mississippi and in fact issued insurance policies in the State of Mississippi;

> (h) Respondent United States Automobile Association is an inter-insurance exchange which exclusively issues insurance policies to persons who are actually members of the United States Armed Services or who have been enlisted in the Armed Forces of the United States and necessarily this Respondent could expect its policyholders to be quite mobile and it would be quite unrealistic and unfair to restrict questions concerning coverage to the state where the insurance policy was originally issued."

Application of Nebraska law as directed by the Mississippi Supreme Court violates the Full Faith and Credit Clause and the Fourteenth Amendment as indeed the contacts with the State of Nebraska are undeniably insignificant. The Mississippi Supreme Court improperly invented a contact, i.e., the agent in Nebraska who does not exist, and the Mississippi Supreme Court fully failed to appreciate the legal significance of the residency of the Petitioners in the State of Mississippi at the time litigation was instituted.

As recent as June 26, 1985, this Court decided the case of *Phillips Petroleum Corporation v. Shutts, et al,* 53 LW 4879, which again held that the Due Process Clause and the Full Faith and Credit Clause require that in a conflict of laws case, that in consideration of such substantive law to be selected, a state must have a significant aggregation of contacts with the parties and the subject matter.

The determination of sufficiency of contacts is a factual determination to be made by the District Court under Rule 52 of the Federal Rules of Civil Procedure. The District Court in this case, applied Mississippi law on the basis of detailed factual findings as to the sufficiency of contacts, and this determination has never been shown to be clearly erroneous.

CONCLUSION

It is respectfully submitted that this Court should grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ben F. Galloway, Attorney for Petitioners, do hereby certify that I have this day mailed, by United States mail, postage prepaid, three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the firm of Bryan, Nelson, Allen, Schroeder & Cobb, at their usual mailing address of Post Office Drawer 4108, Gulfport, Mississippi, 39502.

This the 17th day of September, 1985.

Ben F Galloway, Jr.

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JOSEPH BOARDMAN and HENRY BOARDMAN
Plaintiffs

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION
Defendant

CIVIL ACTION NO. S81-0219(N)

Filed Oct. 25, 1982

MEMORANDUM OPINION

This cause is before the Court on the basis of a Motion for Partial Summary Judgment filed by the plaintiffs, Joseph and Henry Boardman, and a Motion for Summary Judgment by the defendant, United Services Automobile Association (USAA). Both parties to this action are requesting that the Court make a determination of the duties and obligations existing under a policy of automobile insurance which exists between the parties.

In essence, the plaintiffs have filed their Motion for Partial Summary Judgment, seeking an adjudication that there existed uninsured motorist coverage under Henry Boardman's policy for his son, Joseph Boardman's accident, this being in the sum of $60,000.00. The defendant has also filed a Motion for Summary Judgment seeking an adjudication that under the terms of the insurance contract there is no

uninsured motorist coverage for the accident. In the alternative, the defendant argues that if the Court finds that coverage exists, the limit of benefits available to the plaintiffs is in the amount of the $10,000.00 minimum statutory requirement of the Mississippi Safety Responsibility Act. The Court is of the opinion that there are no genuine issues of material fact and thus the issues before the Court are strictly questions of law.

The facts of this controversy are basically undisputed. As previously stated, the plaintiffs are Henry and Joseph Boardman. At the time the suit was filed, Henry Boardman was a resident of the state of Alabama and Joseph Boardman was a resident of the state of Mississippi. USAA is a foreign insurance company which is also authorized to do business in the state of Mississippi. The company issued automobile insurance Policy Number 036-97-48U-7102-9 to Henry Boardman when he was a resident of Omaha, Nebraska, stationed with the United States Air Force in Omaha, which covered the period from September 15, 1978, to September 15, 1979. The policy covered three automobiles, and a separate premium was paid on each.

The evidence indicates that Joseph Boardman, age 19, entered Mississippi State University, Starkville, Mississippi, during the fall and spring semesters of the 1978-79 term and in May, 1979 came to Gulfport, Mississippi, directly from school to work for his paternal uncle who operates Coast Materials located in Gulfport. While Joseph was in school he was permitted by his father to operate a Pinto automobile which was one of the vehicles insured under the above policy of insurance. Joseph drove the Pinto to Gulfport and operated it until his father came to Gulfport and took possession of it in order to deliver it to Joseph's sisters who lived in Cincinnati, Ohio.

On June 14, 1979, Henry Boardman requested that USAA remove Joseph as a named insured on the automobile insurance policy, which deletion was made by USAA on June 16, 1979. Henry Boardman had also requested that USAA reinstate as operators of the 1977 Pinto his daughters Rosamon and Suzanne, who had been deleted while the vehicle was in Joseph's possession.

On June 20, 1979, Joseph purchased a 1970 Chevrolet Caprice automobile from Jay-Jay Chevrolet in Gulfport. He signed a title application prepared by the dealer, and on the same day Jay-Jay delivered the vehicle with an invoice. An application was made by Joseph for title, and he purchased a Mississippi license tag for the vehicle. Subsequent to the purchase of the Caprice, Joseph had a discussion with his father concerning insurance coverage; however, none was actually purchased prior to the accident, which forms the basis for this action.

It is undisputed that on the evening of July 8, 1979, Joseph Boardman was at his apartment watching television with three other young men. A decision was made by all the boys to drive to a popular night spot in Biloxi, Mississippi, and accordingly, Joseph drove one passenger in the Caprice while David Turan, another young man, drove his vehicle to the same night spot. On the return trip, the young men were traveling on U.S. Highway 90 when a third vehicle pulled onto the highway in front of the Turan vehicle, and in attempting to avoid striking it, the Turan vehicle crossed in front of Joseph Boardman's vehicle, forcing it to leave the road, where Joseph lost control, resulting in the accident which is the subject of this controversy.

As a result of the accident, Joseph Boardman lost his right eye, suffered multiple facial fractures, chipped his

right knee cap, severed tendons and fractured bones in his left foot, for which he received medical treatment from the Keesler Medical Center in Biloxi, Mississippi, and Maxwell Air Force Base in Montgomery, Alabama.

There has been an allegation in the affidavit of Walter E. Smith, claims supervisor of USAA, that David Turan and Joseph Boardman were "racing" at the time of the accident. This allegation is unsupported by any direct evidence and would therefore, in the opinion of this Court, constitute hearsay not sufficient to raise a question of material fact in this matter.

As previously stated, the 1970 Caprice was never added to the policy of Henry Boardman, nor was any premium paid for any coverage under that or any other insurance contract. Subsequent to the accident, the plaintiffs filed this claim for uninsured motorist benefits arising from this accident under the USAA policy in which Henry Boardman was the named insured. USAA denied coverage as to Joseph Boardman on the ground that he was driving an owned motor vehicle, which was not an insured vehicle under the subject policy, thereby being specifically excluded under the policy terms.[1]

The following questions of law are present and will be discussed fully herein by the Court: (1) Under conflict of law principles, do the laws of Nebraska or Mississippi provide the basis for the interpretation of the insurance

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1. The USAA insurance policy provides:

"*Exclusions*: **This policy does not apply under Part IV: (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative or through being struck by such an automobile;"**

policy in the case sub judice? (2) Is the policy exclusion of "owned" vehicles not listed on the policy valid and applicable? (3) If the exclusion is void and coverage exists, is there aggregation or "stacking" of uninsured motorist coverage for the three vehicles listed in the declarations of Henry Boardman's policy?

CONFLICT OF LAWS

Jurisdiction herein is based on diversity of citizenship, compelling this Court, pursuant to the dictates of *Erie*, to apply the conflict of laws rule which conforms to those prevailing in the state in which it sits; vis-a-vis, the conflict of laws rule of the state of Mississippi. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 Sup. Ct. 1020, 85 L.Ed. 1477, 1480 (1941).

The Mississippi Supreme Court, in dealing with conflict of laws issues, has traditionally applied the "center of gravity" test to matters of this nature. Under this test, the court trying the cause of action will apply the law of the place which has the most significant relationship to the event and the parties, or, because of the relationship or contact with the event or parties, has the greatest concern with the specific issues with respect to the liabilities and rights of the parties to the respective litigation. *See Craig v. Columbus Compress & Warehouse Co.*, 210 So.2d 645 (Miss. 1968). In a case decided subsequent to *Craig*, the Mississippi Supreme Court determined that "a case is to be governed by the law of the forum unless it is expressly shown that a different law applies, and in case of doubt, a court will naturally prefer the laws of its own state." *Mitchell v. Craft*, 211 So.2d 509, 512 (Miss. 1969). The *Mitchell* court proceeded to list certain criteria which a court should consider in determining a conflict of laws question. Borrowing from the RESTATEMENT SECOND

of CONFLICT OF LAWS § 145 (1968), the court stated:

> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> *Id.* at 515.

Although the Court is aware that Mitchell was a tort action the applicability of those principles to the present controversy is apparent from a reading of the subsequent decision of the Fifth Circuit Court of Appeals concerning the interpretation of an insurance contract. As alluded to, the "center of gravity" test was applied in an insurance contract interpretation context in the case of *Bluebird Body Co. v. Ryder Truck Rental*, 583 F.2d, 717 (5th Cir. 1978). *Bluebird* involved a situation where although the

accident giving rise to the cause of action occurred in Mississippi, the insurance company had paid off the claims of the injured Mississippi residents as well as the driver and passenger of the private car involved in the collision. As a result, the court found that Mississippi had no real concern with the issues involved in the litigation. Initially, the *Bluebird* court determined that since the suit was filed in United States District Court in Mississippi, the court must apply the general choice of law rule that would be applied by a Mississippi court had the case been filed in state court. It then proceeded to state that Mississippi recognized and applied the "center of gravity" approach resolving choice of law issues in contract cases. *See Dunavant Enterprises, Inc. v. Ford*, 294 So.2d 788 (Miss. 1974). The court went on to find that the contacts with the state of Georgia were much more significant than those of Mississippi, which therefore led to the conclusion that Georgia law would control the interpretation of the policy. 583 F.2d at 723.

USAA has cited several cases for the proposition that in choice of law situations involving insurance policies, the Mississippi Supreme Court has held that the laws governing the construction of those policies are substantive in nature and as such, the substantive law of the state where the policy originated should apply. *Nationwide Mutual Ins. Co. v. Tillman*, 249 Miss. 141, 161 So.2d 604, 613 (1964); *United States Fidelity and Guaranty Co. v. Yost*, 183 Miss. 65, 183 So. 260, 263, 185 So. 564 (1938); *Interstate Life and Accident Co. v. Pannell*, 169 Miss. 50, 152 So. 635, 638 (1934). It is evident from a perusal of those decisions that they were based upon the "center of gravity" test so that the contacts with the state in which the policy was issued were greater than those of the forum state. The Court notes, though, that the defendants go on to cite the *Bluebird* case as the leading authority for the "center of gravity" approach in resolving choice of

law issues in contract cases, and that furthermore, the application of that rule under the circumstances of the case sub judice would not alter the fundamental principal of lex loci contractus. In reading the *Bluebird* decision, it is apparent that the state of issuance was but one factor which the court considered in determining which state had the greater contacts.

The Court agrees with counsel for both parties that the "center of gravity" test is the applicable standard in determining which law would apply herein. We therefore must proceed to the consideration of the relevant factors in determining whether the law of the forum state or the law of the state where the contract was issued is controlling; that is, whether Nebraska or Mississippi law would apply. The facts are basically undisputed and show that the USAA policy was issued in Nebraska to Henry Boardman, who, at the time, was a resident of Nebraska. At the time the policy was issued, it covered three vehicles which were garaged in the state of Nebraska. It is undisputed that USAA sets its insurance premiums for the state of Nebraska based upon loss ratios as determined from policies of insurance issued there, which would also include claims arising from accidents which occur in sister states. The defendants therefore allege that considering these contacts, under the *Bluebird* decision, the law of the state of Nebraska would be the appropriate law to apply in the interpretation of the USAA insurance policy; however, we are of a different opinion when the contacts with the state of Mississippi are examined. Those contacts include the accident which has given rise to this cause of action. The parties involved in the accident, including both plaintiffs, are all residents of the state of Mississippi; the vehicle for which coverage is sought under the applicable policy of insurance was purchased in the state of Mississippi; a Mississippi license tag was issued for the vehicle; all wit-

nesses to the accident reside in Mississippi; and finally, at the time of the accident, the defendant, USAA, was qualified to do business in Mississippi and, in fact, issued insurance policies in Mississippi. Relevant to this consideration, is the fact that USAA is an inter-insurance exchange which principally issues insurance policies to persons who are members of the United States armed forces and therefore is aware of the transient nature of those insureds and their families.

Considering the criteria laid down in *Mitchell* and *Bluebird*, and considering the relevant undisputed facts in the case, we are of the opinion that Mississippi would meet the "center of gravity" test as previously discussed, that Mississippi has the most significant contacts with this case, and therefore, that Mississippi law should be applied. The factors which are of primary significance to the Court in making this determination include the occurrence of the accident and injury in Mississippi. Additionally, although the policy of insurance was issued in Nebraska, by virtue of the nature of USAA's issuance of policies to members of the armed forces, they could and should expect those insured persons to be transient, and therefore, USAA could anticipate being hailed into court in a foreign jurisdiction. To require every insured who files a claim against USAA to litigate that claim in the state in which the policy was issued, notwithstanding other relevant factors which the court should consider, would put an onerous burden on those claimants and would fly directly in the face of the "center of gravity" test. It is our conclusion therefore that Mississippi law applies and controls the interpretation of the insurance policy in this case.

THE EXCLUSION

The Court need not engage in a discussion of whether the Joseph Boardman vehicle was, at the time of the acci-

dent, an "owned" vehicle as within the exclusionary clause since, as will be more fully discussed, the determination that Mississippi law is applicable has obviated the necessity of such a determination. Furthermore, the Court notes that the parties have stipulated that under the laws of Mississippi, the vehicle in question would be an "owned" motor vehicle. Thus the Court need only address the validity of the exclusionary clause under Mississippi law.

It is incumbent upon the Court, however, to determine initially whether vel non the plaintiff, Joseph Boardman, is an insured under the uninsured motorist provisions of the policy in question. USAA's obligation to pay under the uninsured motorist provisions of the policy are contained in Coverage J.[2] The policy provisions delineate who is an insured under the PART I - LIABILITY section of the policy. That section states: "Persons Insured: The following are insureds under Part I: (a) with respect to the owned automobile, (1) the named insured and any resident of the same household, . . . ; 'relative' means a relative of the named insured who is a resident of the same household; . . . ." Not only has the defendant admitted that under this provision of the policy the plaintiff, Joseph

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2. **Uninsured Motorists (Damages for Bodily Injury): To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and rising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.**

Boardman, would undoubtedly be an insured, but the evidence is uncontradicted that he, although attending Mississippi State and working during the summer months in Gulfport, Mississippi, maintained his permanent address with his parents in Omaha, Nebraska. Furthermore, the evidence indicates that the plaintiff, Joseph Boardman, was receiving monetary support from his father, Henry Boardman, at the time that he was a student at Mississippi State University. We are further of the opinion that it is a reality of modern society that children will often leave home to attend school outside the state of their residence and that not only the parents but the insurance companies themselves should anticipate such an arrangement, and therefore, the Court must interpret the meaning of the word "relative" in a liberal manner so as to best effectuate the true intent of the parties at the time that they entered into this insurance contract. We therefore are of the opinion that Joseph Boardman falls within the definition of a "relative" under the policy terms and would thus be an insured thereunder.

The defense of USAA is, in part, predicated upon the validity of the exclusionary clause of the contract in question. That clause provides:

> *Exclusions*: This policy does not apply under Part IV:
>
> (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative or through being struck by such an automobile.

The validity of the aforementioned clause has been addressed by the Mississippi Supreme Court in the case of *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d

767 (Miss. 1973), in which the court, in a very lengthy and thorough opinion, discussed the validity of a similar clause as it related to the uninsured motorist statutes of the state of Mississippi. In *Lowery*, the plaintiff was riding and operating a Honda motor bike, and through no fault of his own, was struck by a car driven by an uninsured motorist. As a result of the accident, he sustained extensive injuries. He alleged that since he lived in the household of his father, he was insured under the terms of the policy against injury resulting from the negligent acts of an uninsured motorist. The plaintiff contended, at both the trial and appellate level, that the insurance company was indebted to him for the injuries sustained as a result of the accident since he was injured by an uninsured motorist. The motorcycle on which the plaintiff was riding was not listed as an insured vehicle under the terms of the policy; however, the plaintiff did come within the definition of the term "insured" thereunder. The issue in *Lowery* was whether the insurance policy covered an insured owner of a vehicle and the members of his family who are injured while riding in or on another motor vehicle not mentioned in the insurance policy. As stated, the policy also contained a clause which provided, in part:

> This insurance does not apply . . . to bodily injuries to an insured while occupying or through being struck by a land motor vehicle owned by a named insured or any resident of the same household, if such vehicle is not an owned motor vehicle, . . . *Id.* at 769.

As previously stated, the Mississippi Supreme Court engaged in a lengthy, thorough and analytical discussion of the validity of such a clause as it related to the uninsured motorist statutes, particularly those in Mississippi. We note parenthetically that, as previously stated, since the defense

in the action sub judice is dependent upon this Court's applying Nebraska law as it relates to the validity of the exclusionary clause, the previous determination that Mississippi law applies obviates the necessity for a discussion of how Nebraska law would treat this exclusionary clause.[3]

In holding that the above exclusionary clause was void as a violation of public policy, the Mississippi Supreme Court in *Lowery* stated:

> In interpreting similar, if not identical statutes, the vast majority of jurisdictions have stated that the purpose of such uninsured motorist laws is to provide protection to innocent insured motorists and passengers injured as a result of the negligence of financially irresponsible drivers.
>
> ' * * * Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose.' *Rampy v. State Farm Mutual Automobile Insurance Co.*, 278 So. 2d 428 (Miss. 1973).
> *Id.* at 770.

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3. Under Nebraska law, as outlined in *Herrick v. Liberty Mutual*, 274 N.W. 2d 147 (Neb. 1979), it appears that an exclusionary clause of the type in the case sub judice would be valid, as it would bar recovery of the plaintiff herein if we found that the insured was operating an "owned " automobile other than an insured automobile listed in the policy.

In its analysis, the Mississippi Supreme Court spoke to the proper relation of such exclusionary clauses to the public policy of the state as set forth in MISS. CODE ANN. §§ 83-11-101 and 83-11-103 (Supp. 1980). In concluding, the *Lowery* court stated: "The great weight of authority supports the appellant's contention that the exclusionary clause in the present case violates the public policy of this state as manifested by the Mississippi Uninsured Motorist Act." *Id.* at 777.

Having considered and analyzed the clause in question, we are of the opinion that under the Mississippi Supreme Court's holding in *Lowery*, the clause in the USAA policy is void as against public policy, and if the Mississippi Supreme Court were called upon to interpret the language of the USAA policy, it would so hold. Since this Court is *Erie* bound to follow the substantive law of Mississippi as stated in *Lowery*, we hold that the clause in question is void because against public policy, and therefore, coverage would exist as to the plaintiff, Joseph Boardman, as an insured within the definitions of the policy. It is clear to this Court that the holding in *Lowery* dictates such a result.

STACKING

The final question for the Court involves the question of whether the plaintiffs, under the policy terms, can aggregate or "stack" insurance coverage herein. The pertinent language in the policy in question reads:

> Limits of Liability:
> (a) The limit of liability for uninsured motorists coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for

> care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as a result of any one accident.

We are aware of the numerous decisions by the Mississippi Supreme Court speaking to the question of "stacking" under an uninsured motorist provision in an insurance policy, and that we are *Erie* bound to interpret the provision in the USAA policy in the case sub judice in light of those pronouncements by the Mississippi Supreme Court.

It is clear to this Court that the ability to stack uninsured motorists coverage is well established in Mississippi. One of the first pronouncements on this issue was made in *Southern Farm Bureau Casualty Insurance Co. v. Roberts*, 323 So. 2d 536 (Miss. 1975), wherein the Mississippi Supreme Court held that the plaintiff could aggregate coverage under the uninsured motorist endorsement on three separate insurance policies in order to recover all sums to which he was legally entitled as damages for bodily injury. *Id.* at 537. *See also State Farm Mutual Auto Insurance Co. v. Bishop*, 329 So. 2d 670 (Miss. 1976). The *Roberts* court based its decision upon the statutorily required uninsured motorist endorsement, stating that since premiums were charged and collected on each policy, the policyholder should be allowed to realize the benefits for which he had paid. *Id.* at 538.

Two years later, the Mississippi Supreme Court decided *Hartford Accident & Indemnity Co. v. Bridges*, 350 So. 2d 1379 (Miss. 1977), a case which is analagous to the case sub judice, and in which the Mississippi Supreme Court relied upon *Roberts* in reaching its decision. The pertinent limits of liability clause in the policy in the *Bridges* case read:

> The limit of liability for uninsured motorists coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total of the company's liability for all damages including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident. *Id.* at 1381.

As is apparent, the policy language in *Bridges* is identical to that in the USAA policy at issue herein. Although it determined that the limits of liability language was ambiguous, the *Bridges* court did recognize that an insurance company could legally limit its uninsured motorist coverage to the minimum specified by the financial responsibility law. *Id. See Talbot v. State Farm Mutual Automobile Insurance Co.*, 291 So. 2d 699 (Miss. 1974). The court went on to state that this must be done by "clear and unambiguous language." The conclusion of the court was that the language in the limits of liability clause was "ambiguous and must be construed most strongly against its creator." *Id.* at 1382. Again, "stacking" was allowed. In giving further support

to its holding, the court found that, as in the present case, the insurance company had charged a separate premium for the uninsured motorist coverage on each automobile and not a lump sum premium.[4] As previously stated, the *Bridges* decision stands for the proposition that if the insurance company wished to limit its coverage, it must provide for such limitation in "clear and unambiguous language" which would impart to the insured a clear understanding that such limitations were present.

In *Pearthree v. Hartford Accident & Indemnity Co.*, 373 So. 2d 267 (Miss. 1979), the supreme court again held that the plaintiff could aggregate uninsured motorist coverage on two cars, and that this could be done to determine the overall liability of the insured. *Id.* at 268. In *Pearthree*, the court determined that the policy language fell squarely within the criteria established by *Bridges*, but that the interpretation allowing aggregation was required because of the ambiguity found in the limiting clause in the policy covering more than one car, and not because separate premiums were charged. *Id.* at 270. Again, the material language in the *Pearthree* decision tracks that of the exclusionary

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4. This Court is cognizant that the charging of a separate premium is not necessarily controlling in determining whether the insured has aggregate coverage under the uninsured motorist provisions of the policy; however, as stated in *Bridges*, the charging of a separate premium raises the presumption or inference that the coverage in the policy is the same as would be supplied if the coverage was provided for in separate and distinct policies covering the same auto vehicles.

clause in the case sub judice.[5]

In 1980, United States District Judge Dan M. Russell, Jr., handed down his decision in *St. Arnaud v. Allstate Insurance Co.*, 501 F. Supp. 192 (S.D. Miss. 1980), in which he cited *Roberts*, *Bishop*, *Bridges*, and *Pearthree*, holding that there existed an ambiguity in the limits of liability clause in the uninsured motorist provisions of the policy, and further, that the "stacking" of the uninsured motorist coverage would be allowed to determine the insured's limits of liability. Although we are cognizant that the determination of the ambiguity in the *St. Arnaud* case turned partly upon the definition of the term "under-insured automobile," we feel compelled to note that the limits of liability clause in *St. Arnaud* in all material respects was identical to that in the USAA policy in question, and that the court in *St. Arnaud*, after making the determination that the term "under-insured automobile" actually meant uninsured motorist, went on to find that an ambiguity did exist in the

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5. The limitation clause in the *Pearthree* case read:

Limits of liability:
(a) The limit of liability for Uninsured Motorist (Family Protection) Coverage stated in the declaration as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as a result of any one accident. *Id.* at 269.

terms of the policy because the company did not clearly and unambiguously restrict its liability therein.[6]

Finally, this Court is quite familiar with the case of *Blansett v. American Employers Insurance Co.*, 652 F.2d 535 (5th Cir. 1981), wherein the Fifth Circuit affirmed this Court's decision limiting coverage to $10,000 on a fleet policy insuring seven vehicles, notwithstanding that the policy specified a separate premium for the uninsured motorist coverage provided on each vehicle. In limiting coverage in the *Blansett* case, this Court based its decision on the language of the limits of liability clause in the insurance policy. Comparing the language of the limits of liability clauses in the *Blansett* case and in the policy presently under consideration, it is clear that in *Blansett*, the insurer clearly and unambiguously limited its uninsured motorist coverage to a minimum amount specified by the financial responsibility law. The pertinent part of the policy, and more specifically the limitations of liability clause, in the *Blansett* case read:

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6. Under the uninsured motorist coverage, the policy in *St Arnaud* stated that:

> (6) (a) The limit of liability stated in the Declarations as applicable to "each person" is the limit of Allstate's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the Declarations as applicable to "each accident" is the total limit of Allstates's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident. *Id.* at 193.

II. LIMITS OF LIABILITY

> *Regardless of the number of* (1) persons or insureds under this policy, (2) persons who sustain bodily injury, (3) claims made or suits brought on account of bodily injury or (4) *highway vehicles to which this policy applies*,
>
> (a) The limit of liability stated in the schedule as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person," the limit of liability stated in the schedule as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident. *Id.* at 536-537.
>
> (Emphasis added.)

There is a distinction between the policy language in *Blansett* and the USAA policy. The relevant phrase in *Blansett* is: "Regardless of the number of . . . highway vehicles to which this policy applies. . . ." This phrase is not found in the USAA policy which, however, does describe a "limit of liability" in language identical to that found in *Bridges*. Additionally, in *Blansett*, the limits of liability clause concerned all claims made on account of bodily injury, which would include uninsured motorist claims, and thus provided the rationale for limiting coverage therein. In *Blansett*, the

Fifth Circuit also recognized the well established rule that if the language in question could be said to be unclear or ambiguous, it must be construed most strongly against the insurer, the drafter of it. *Id.* at 536; *State Farm Mutual Automobile Insurance Co. v. Taylor*, 233 So. 2d 805 (Miss. 1970).

Finally, the Fifth Circuit stated, "Even straining to do so, we can discern no relevant ambiguity in this language," and found that the language in the *Blansett* case was sufficiently clear to limit the coverage under the uninsured motorist provisions of the policy. 652 F.2d at 537.

Considering the policy language in the instant case, we find that the plaintiffs should be permitted to aggregate or "stack" the coverage afforded by the insurance policy. In addition to the aforementioned dictates by the courts of Mississippi, the plaintiff, Henry Boardman, did own an automobile policy covering three vehicles on which separate premiums were paid, and although not dispositive of the question of the limits of liability herein, it is indicative of and does raise a presumption which supports aggregation. Aggregation should also be permitted because of the specific language employed in the subject policy. Identical language was found to be ambiguous and sufficiently unclear to allow aggregation in the *Bridges*, *Pearthree*, and *St. Arnaud* decisions. We find that the language which USAA has used in an attempt to legally limit its liability in order to prevent aggregation is not clear and unambiguous. Furthermore, the language of the policy itself contains no such appropriate limiting language; vis-a-vis, language which would sufficiently impart to the insured the limitations of liability under the uninsured motorist provisions of the policy as was present in *Blansett*. Instead, we find that the language itself indicates that aggregation should be permitted. Under the provisions of the policy entitled "Conditions," it is stated that

"Conditions 1, 2, 3, 6, 14, 15, 16 and 18 apply to all Parts" of the policy, while "Conditions 4 and 5, 7 through 13, and 17 apply only to" Parts I, II, and III. Part IV (the uninsured motorist provision) is excluded from Condition 4, which provides, in part, "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each. . . ." It is clear from this language that separate and distinct coverage as to the uninsured motorist provision is specifically excluded, and therefore, a fortiori that aggregation under that provision is contemplated. This finding is supported additionally by the fact that USAA, under Part IV of the policy, has agreed "[t]o pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . sustained by the insured,. . . ."

This Court therefore finds that as a matter of law there exists an ambiguity in the limits of liability clause in the USAA policy. Furthermore, there is a conflict existing between conditions for the policy and the limits of liability clause so that under the dictates of *Blansett* and other decisions, interpretation of such a clause as it relates to coverage must be resolved in favor of the plaintiffs hereunder, and therefore, aggregation must be permitted. *See State Farm Mutual Automobile Insurance Co. v. Taylor*, 233 So. 2d 805 (Miss. 1970).

CONCLUSION

In sum, Mississippi law applies under the "center of gravity" test; that under the decisions of the Mississippi Supreme Court, the exclusionary clause relied upon by USAA is null and vild as a violation of public policy; that Joseph Boardman is an insured under the USAA policy herein; that the contract of insurance existing between the plaintiffs and the defendant provides uninsured motorist coverage to the plaintiff, Joseph Boardman; and that the language of the limits of liability clause herein is ambiguous, thus permitting aggregation of the policy limits to provide a total of $60,000 uninsured motorist coverage for the plaintiff, Joseph Boardman.

We therefore are of the opinion that the plaintiffs' Motion for Partial Summary Judgment is well taken and is hereby granted. Accordingly, the defendant's Motion for Summary Judgment is without merit and is denied.

A Judgment conforming with this opinion, approved as to form by counsel, shall be submitted to the Court within the time and manner provided by our local rules.

THIS the 21st day of October, 1982, at Biloxi, Mississippi.

/s/ WALTER L. NIXON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX B

Joseph BOARDMAN and Henry Boardman,
Plaintiffs-Appellants,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant-Appellee.

No. 83-4310.

United States Court of Appeals,
Fifth Circuit.

Sept. 14, 1984.

In action for uninsured motorist coverage under automobile insurance policy, the United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., Chief Judge, found, interalia, that Mississippi law would be applied under Mississippi choice-of-law "center of gravity" test, and insurer brought interlocutory appeal. The Court of Appeals, Brown, Circuit Judge, held that since weight which would be given to various factors by Mississippi was unknown, Court of Appeals would certify choice-of-law questions to Mississippi Supreme Court.

Order accordingly.

1. **Federal Courts KEY 392**

Where action concerning uninsured motorist coverage involved choice of law which would be applied by Mississippi courts and weight which would be given to various factors by Mississippi was unknown, Court of Appeals would certify choice-of-law questions to Mississippi Supreme Court. Miss. Sup.Ct.Rules, Rule 46.

2. **Insurance KEY 467.51(1)**

Under Nebraska law, automobile insurance contract's exclusionary language denying benefits for uninsured motorists coverage is valid.

3. **Federal Courts KEY 392**

Mississippi Supreme Court would not be bound by perimeters of questions certified to it by Court of Appeals.

Harry R. Allen, Billy W. Hood, Gulfport, Miss., for plaintiffs-appellants.

Ben F. Galloway, Sherman Muths, Jr., Gulfport, Miss., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, GEE, and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This diversity case presents questions of Mississippi law on which Mississippi should have the final answer and for which Mississippi affords the means to obtain that answer. Guided by the great principles of federalism, we defer decision and certify decisive questions to the Supreme Court of Mississippi,[1] pursuant to its Rule 46, adopted August 1, 1980.

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1. *See generally In re McClintock*, 558 F.2d 732, n. 2, 3, 4, and 5 (5th Cir.1977) and cases cited; J. Brown, *Certification-Federalism in Action*, 7 Cum.L.Rev. 455 (1977) (tracing the development of the certification doctrine and the Court's care to avoid "wearing out its welcome" by

Our problem—choice of law, Mississippi or Nebraska—arises out of the following situation. Plaintiff-Appellant Joseph Boardman, age 19, was a student in Mississippi during the 1978-79 school term. During the summer of 1979 he worked in Gulfport, Mississippi for his uncle. While at school, Joseph had been permitted by his father to operate an automobile which was insured under his father's insurance policy issued by defendant United Services Automobile Association (USAA). Joseph Boardman drove this automobile until his father delivered it to Joseph's sister. After Joseph no longer had the car, Henry Boardman requested USAA to remove Joseph as a named insured from his automobile insurance policy.

On June 20, 1979, Joseph Boardman purchased a 1970 Chevrolet Caprice from an automobile dealer in Gulfport, Mississippi. He applied for a title and purchased and obtained a Mississippi license tag for his car. After Joseph purchased this particular automobile he discussed with his father having it insured by USAA, but no insurance was purchased, nor was any notice of the acquisition of a new vehicle given to USAA prior to Joseph's accident on July 8, 1979. Thus, prior to the date of the accident, Joseph's 1970 Chevrolet was never added to the policy of his father, nor was any premium paid for coverage under any other insurance contract. Joseph's claim for compensation for his personal injuries arising out of an accident with an uninsured motorist was denied by USAA under the policy's exclusionary clause on the grounds that Joseph was driving a motor vehicle which Joseph solely owned, which was not an insured

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an apparent practice of ducking troublesome state law questions). Of the certification procedure, then Chief Judge Godbold wrote: "both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism." *American Eastern Development Corp. v. Everglades Marina*, 608 F.2d 123, 125 (5th Cir.1979).

vehicle as defined under the USAA policy of his father.[2]

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2. PART IV—PROTECTION AGAINST UNINSURED MOTORISTS COVERAGE J—UNINSURED MOTORISTS (DAMAGES FOR BODILY INJURY):
To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile . . .
DEFINITIONS: The definitions under Part I, except the definition of "insured", apply to Part IV, and under Part IV:"insured" means:
(a) the named insured and any relative;
(b) any other person while occupying an insured automobile;
(c) any person, with respect to damages he is entitled to recover because bodily injury to which this part applies sustained by an insured under (a) or (b) above.
"insured automobile" means:
(a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded,
(b) a private passenger, farm or utility automobile, ownership of which is acquired by the named insured during the policy period provided
(1) it replaces an insured automobile as defined in (a) above, or
(2) the company insures under this Coverage all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period or within 30 days after the date of such acquisition of this election to make the Liability and Uninsured Motorist Coverages under this and no other policy issued by the company applicable to such automobile,
(c) a temporary substitute automobile for an insured automobile as defined in (a) or (b) above, and
(d) a non-owned automobile while operated by the named insured; and the term "insured automobile" includes a trailer while being used with an automobile described in (a), (b), (c) or (d) above, but shall not include:
(1) any automobile or trailer owned by a resident of the same household as the named insured,
(2) any automobile while used as a public or livery conveyance,

Plaintiffs filed a motion for partial summary judgment, seeking an adjudication that there existed uninsured motorist coverage for Joseph's personal injuries under Henry Boardman's policy. They also sought an adjudication that the uninsured motorist benefits could be stacked under the terms and provisions of the automobile insurance contract for a total coverage of $60,000. Defendant USAA filed a cross motion for summary judgment seeking an adjudication that there was no uninsured motorist coverage for Joseph's accident. USAA also sought an adjudication that there could be no stacking even if the court found that the coverage existed and that the limitation on benefits available to Joseph Boardman was $10,000.00, the minimum statutory requirement fo the Mississippi Safety Responsibility Act.

In its opinion, the District Court held that Mississippi law would be applied to the insurance contract under the Mississippi choice of law "center of gravity" test. The Court also held that (i) the exclusionary clause[3] relied upon by USAA was void as a violation of Mississippi public policy; (ii) Joseph Boardman was an insured under the USAA policy; (iii) the contract of insurance existing between Henry Boardman and USAA provided uninsured motorist coverage to Joseph Boardman; and (iv) the language of the limitation of liability clause found in the policy was ambiguous. thus permitting stacking of the policy limits to provide

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or

(3) any automobile while being used without the permission of the owner.

EXCLUSIONS: This policy does not apply under Part IV:

(a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) *owned* by the named insured or a *relative*, or through being struck by such an automobile. . . (emphasis added).

3. *See supra* note 2.

a total uninsured motorist coverage of $60,000. The interlocutory appeal of USAA was granted on May 16, 1983.

[1,2] This diversity suit, filed in a Mississippi federal district court, requires that we apply the choice of law rules a Mississippi court would apply had the case been filed in a state court. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). While it is clear that the Mississippi Supreme Court in choice of law situations applies and recognizes the "center of gravity" test, such a decision under that test clearly applicable to the fact situation in this case eludes us.[4] While it is clear

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4. As a partial example, the court has closely examined the following cases involving Mississippi choice of law principles for guidance in this matter: *Maryland Casualty Co. v. Integrity Insurance Co.*, 693 F.2d 506, 511 (5th Cir.1982); *Vicon, Inc. v. CMI, Corp.*, 657 F.2d 768 (5th Cir.1981); *FMC Finance Corp. v. Reed*, 592 F.2d 238 (5th Cir. 1979); *Blue Bird Body Co. v. Ryder Truck Rental*, 583 F.2d 717 (5th Cir.1978); *Bunge Corp. v. Biglane*, 418 F.Supp. 1159 (S.D.Miss. 1976); *Maryland Casualty Co. v. Williams*, 377 F.2d 389 (5th Cir. 1967); *Mid-Continent Telephone Corp. v. Home Telephone Co.*, 319 F.Supp 1176 (N.D.Miss.1970); *Spragins v. Louise Plantation*, 391 So.2d 97 (Miss.1980); *Vick v. Cochran*, 316 So.2d 242 (Miss.1975); *see Dunavant Enterprises, Inc. v. Bowman*, 274 So.2d 109 (Miss. 1973); *Mitchell v. Craft*, 211 So.2d 509 (Miss.1968); *Craig v. Columbus Compress & Warehouse Co.*, 210 So.2d 645 (Miss.1968); *Nationwide Mutual Insurance Co. v. Tillman*, 249 Miss. 141, 161 So.2d 604 (1964).

that under this approach, "the Court trying the action applies the law of the place which has the most significant relationship or contact with the event or parties, has the greatest concern with the specific issues with respect to the liabilities and rights of the parties to the litigation," *Craig v. Columbus Compress and Warehouse Co.*, 210 So.2d 645 (Miss.1968), it is precisely the significance or the lack of significance of these contacts which troubles us. We discern no clear path from the cases cited by the District Court or the parties. In addition to the unknown relative weight to be given by Mississippi to the choice influencing principles of § 6 and the relevant comments of the Restatement (Second of Conflicts,[5] it is also unclear how the Mississippi courts employ

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5. § 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors, relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

the more specific § 188[6] and § 193[7] which appear to bear on the case before us. Also at stake is the weight of the policy embodied in the Mississippi Safety Responsibility Act in

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6. § 188. Law Governing the absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
(2) In the absence of an effective choice of law by the parties (see § 187), the contracts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties,
These contacts are to be evaluated according to their relative importance with respect to the particular issue.
(3) If the place of negotiating the contract and the place of the performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

7. § 193. Contracts of Fire, Surety or Casualty Insurance
The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

helping to assure that motorists involved in accidents with uninsured motorists do not become public charges in Mississippi. Finally, depending almost certainly on the choice of law decision is the validity of the USAA policy's uninsured motorist exclusionary clause.[8]

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8. If Nebraska law is held to govern the insurance contract. the exclusionary clause is valid because the Supreme Court of Nebraska has clearly upheld the validity of the insurance contract's exclusionary language denying benefits for uninsured motorist coverage. Accordingly, if Nebraska law applies under the Mississippi "center of gravity" test, Joseph Boardman cannot recover for his injuries. *See Herrick v. Liberty Mutual Fire Insurance Co.*, 202 Neb. 116, 274 N.W.2d 147 (1979). The *Herrick* Court held as follows:

> In *Shipley v. American Standard Insurance Co. of Wisconsin*, 183 Neb. 109, 158 N.W.2d 238 (1968), the Plaintiff was operating an uninsured motorcycle when he was injured in a collision with another motorcycle operated by an uninsured motorist. We held that the Plaintiff could not recover under the uninsured motorist provision of a policy which insured a Chevrolet automobile owned by the Plaintiff excluded coverage for "bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured. . . . We held that an uninsured motorist endorsement should be interpreted in light of the statutory requirements concerning victims of negligent and financial irresponsible motorists, citing *Stephens v. Allied Mutual Insurance Company*, 182 Neb. 562, 156 N.W.2d 133, (1968). An overriding public policy of protecting an owner/operator who inexcusably has no applicable bodily injury liability is not presently discernible.
>
> *An insurance contract should be interpreted in accordance with reasonable expectations of the insured at the time of the contract, Stephens v. Allied Mutual, supra.* Plaintiff does not assert that he had bodily injury liability coverage applicable to his motorcycle under the contract. He might

Fully aware of Mississippi's imprimatur on § 6 we might–by piecing together some of our own deliverances and the District Court opinions dutifully following them–come up with a fair prediction of what Mississippi would hold in this case, but we do not think this a wise course. At issue is a matter of great importance to Mississippi. With facilities for positive determination so readily at hand through certification, it is for Mississippi–not us as a fortuitous momentary spokesman–to make its own policy decisions. This is especially so with respect to the ever growing number of serious automobile accidents on the state's highways involving out-of-state vehicles covered or not covered by insurance policies obtained at earlier times and places by persons in our nomadic society.

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expect the uninsured motorist endorsement to cover loss while he was operating his motorcycle, but such expectations are unreasonable.

The statute, of course, relates to automobile liability insurance policies. It requires that uninsured motorist coverage be included in any such policies delivered or issued for delivery in the state unless rejected by the insured. The purpose of the coverage is to protect the insured from uninsured motorists who do not have liability insurance on their vehicle. *It is difficult to find a policy in the statute to protect one uninsured motorist from another uninsured motorist.* This is what the *Shipley* case referred to when it stated: "An overriding public policy of protecting an owner/operator who inexcusably has no applicable bodily liability coverage is not presently discernible." (Emphasis added)

Concerned that we uphold our *Erie*[9] duty to apply the substantive law of the forum state in a diversity case, we seek guidance from the one court constitutionally entitled to supply it. Indeed, as this case centers upon the strength of local Mississippi policies this course is mandated by the principles of federalism. Federal courts should hesitate to "trade judicial robes for the garb of prophet" J. Brown, *Certification--Federalism in Action*, 7 Cum.L.Rev. 455 (1977), when an available certification procedure renders the crystal ball or divining rod unnecessary.

[3] Following our usual practice, we are requesting counsel to submit a joint statement of facts and a proposed certificate of questions, *see West v. Caterpillar Tractor Co.*, 504 F.2d 967 (5th Cir. 1974).[10]

WEST KEY NUMBER SYSTEM

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9. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

10. We point out to the Supreme Court of Mississippi, no doubt unnecessarily, that they need not feel bound in any fashion by the perimeters of the questions certified. We iterate that

> [T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues in the matter in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

Martinez v. Rodriguez, 394 F.2d 156, 159 n. 6 (5th Cir.1968).

APPENDIX C

Joseph BOARDMAN and Henry Boardman,
Plaintiff-Appellants,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant-Appellee.

No. 83-4310.

United States Court of Appeals,
Fifth Circuit.

Oct. 23, 1984.

Harry R. Allen, Billy W. Hood, Gulfport, Miss., for plaintiffs-appellants.

Ben F. Galloway, Sherman Muths, Jr., Gulfport, Miss., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, GEE, and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This appeal presents important issues of modern choice of law principles which are particularly appropriate for resolution by the Mississippi Supreme Court. Broadly speaking, at issue is what relative weight a Mississippi court would give--employing the Mississippi "center of gravity" test--to the choice of law principles in § 6, 188, and 193 of the

Restatement (Second) of Conflicts.

Following our usual practice, we requested that the parties submit a proposed agreed certificate of the issues for decision. Commendably, they have reached full agreement. Since we also agree that these are the substantive issues presented, we submit the parties' statement of facts and our issues disclaiming, however, any intention or desire that the Supreme Court of Mississippi confine its reply to the precise form or scope of the questions certified.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF MISSISSIPPI

TO THE SUPREME COURT OF MISSISSIPPI AND THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Fifth Circuit, that the above styled case in this Court involves questions or propositions of the law of the State of Mississippi which are determinative of the cause, and there appear to be no controlling precedents in the decision of the Supreme Court of Mississippi. This Court hereby certifies the following questions of law to the Supreme Court of Mississippi for instructions concerning said questions of law, based on the facts recited herein:

1. ***Style of the Case***.

The style of the case in which this certificate is made is Joseph Boardman and Henry Boardman, plaintiffs/appellees v. United Services Automobile Association, defendant/appellant, being case number 83-9017, United States Court of Appeals for the Fifth Circuit, such case being an appeal from the United States District Court from the Southern

District of Mississippi.

2. ***Statement of the Case.***

1. USAA issued an automobile insurance policy to Henry W. Boardman, a resident of Omaha, Nebraska, for a policy period covering September 15, 1978, to September 15, 1979. (R 83)

2. The insurance contract was issued in Nebraska, while Henry Boardman was stationed with the United States Air Force in Omaha. (R 83)

3. The policy covered a 1975 Oldsmobile, a 1974 Ford Pinto, and a 1977 Ford Pinto, all principally garaged in Nebraska. (R 83)

4. The Plaintiff-Appellee Joseph Boardman, age 19, entered Mississippi State University of Starkville, Mississippi, during the Fall and Spring semesters of the 1978-1979 term (deposition of Joseph Boardman, page 8).

5. During the Fall and Spring semesters of 1978-1979, Joseph was permitted by his father, Col. Henry Boardman, to operate the Pinto automobile which was insured under the policy of insurance issued by the Defendant, United Services Automobile Association, in the name of Plaintiff-Appellee, Col. Henry Boardman.

6. In May of 1979, Joseph Boardman, came to Gulfport, Mississippi, directly from school to work for his paternal uncle who owns and operates Coast Materials, located in Gulfport, Mississippi (deposition of Joseph Boardman, page 9).

7. Joseph Boardman drove the Ford Pinto automobile

to Gulfport and operated this automobile until his father came to Gulfport and recovered this vehicle in order to deliver the automobile to Joseph's sisters who live in Cincinnati, Ohio (deposition of Henry Boardman, page 11).

8. On June 14, Henry Boardman requested the Defendant to remove Joseph as a named insured on the automobile insurance policy (deposition of Henry Boardman, page 10).

9. USAA effected the deletion of Joseph Boardman on June 16, 1979. (R 95)

10. On June 20, 1979, Joseph Boardman purchased a Chevrolet Caprice automobile from Jay Jay Chevrolet, Gulfport, Mississippi.

11. An application was made by Joseph Boardman for title and additionally he purchased a Mississippi license tag for the Chevrolet Caprice automobile (deposition of Joseph Boardman, pages 16, 19).

12. The 1970 Chevrolet was never added to the policy of Henry Boardman, nor was any premium paid for any coverage under that or any other insurance contract.

13. On July 8, 1979, at approximately 3:00 a.m., Joseph Boardman was injured in an accident with an uninsured motorist, David Turan, in Gulfport, Mississippi, while driving the 1970 Chevrolet.

14. The Plaintiff-Appellee, Joseph Boardman, did not receive title to the Chevrolet automobile until July 9, 1979, or one day following the accident (affidavit of Henry Boardman, R 57).

15. Damages sustained by Joseph Boardman include

severe personal injuries which are undisputed.

16. The claim for uninsured motorist benefits arising from the accident under the USAA policy in which Henry Boardman was the named insured, was denied to Joseph Boardman on the grounds that Joseph was driving an owned motor vehicle, which was not an insured vehicle under the subject policy, thereby being specifically excluded under the policy terms.

17. Nebraska law upholds the "owned vehicle" exclusionary clause.

18. The "owned vehicle" exclusionary clause is invalid under Mississippi law.

3. *Questions to be Certified.*[1]

What relative weight would Mississippi give–applying the "center of gravity" test to the choice of law principles of § 6, 188, and 193, of the Restatement (Second) of conflicts–to the undisputed facts of this case on the following issues.

> 1. Would Mississippi or Nebraska law apply in construing the USAA automobile insurance contract issued to Henry Boardman; or stated differently, under the Mississippi "center of gravity" test, which state would

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1. We emphasize our disclaimer again, *see* note 10, *Boardman v. United Services Automobile Association*, 742 F.2d 847 (5th Cir. 1984) that our phrasing of the questions is not meant to restrict the supreme court of Mississippi to answering the issues as it perceives them.

be deemed to have the most significant contacts with the insurance policy for choice of law purposes?

2. Would Mississippi or Nebraska law govern the validity of the uninsured motorist exclusionary clause;[2] or stated differently, if Nebraska law is held to govern the insurance contract, does Mississippi public policy prevent the enforcement of the exclusionary clause?

3. Would Mississippi or Nebraska law govern the issue of vehicle ownership; or stated differently, would Mississippi under its "center of gravity" test consider Mississippi or Nebraska to have the most significant contacts for the purpose of establishing the law governing vehicle ownership?

The final question proposed by the parties–assuming *arguendo* that uninsured motorists coverage exists is aggregation allowed–has recently been decided in a case certified by our Court to the Mississippi Supreme Court. *Government Employees Insurance Co. v. Brown*, 446 So.2d 1002 (Miss. 1984) appears to permit aggregation.[3] Accordingly, possessed of a clear answer, we do not submit this issue to the busy Mississippi tribunal.

The entire record in this case, together with copies of

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2. The insurance policy exclusionary clause can be found in note 2, *Boardman v. United Services Automobile Association*, 742 F.2d 847 (5th Cir. 1984).

*3. Footnote omitted.

the briefs of the parties, our initial opinion, and the agreed certification are transmitted herewith.

DATE:

CERTIFIED.

APPENDIX D

Joseph BOARDMAN and Henry W. Boardman

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION

No. 55967.

Supreme Court of Mississippi

May 22, 1985

I.

This case comes to us via the lateral appellate process authorized by Rule 46 of the rules of this Court. Specifically, three questions have been certified to us by the United States Court of Appeals for the Fifth Circuit, as will appear below, although that court has disclaimed "any intention or desire that the Supreme Court of Mississippi confine its reply to the precise form or scope of the questions certified".

Rule 46, as originally promulgated, contemplated that we would answer via certification pure questions of law. The questions presented here in no insignificant part are in the nature of law application questions—what result obtains from applying the rules of law to the facts of the case?—rather than pure questions of law as to what is the law of Mississippi on a particular point. There are presented, however, matters with respect to which we perhaps may be of help. In a spirit of cooperative federalism, and motivated further by the realization that this action arises out of an incident occurring almost six years ago and obviously needs to be brought to a conclusion as soon as possible, we will provide several insights which we hope will be of assistance to the Court of Appeals.

En route and for future reference, we will discuss our certification procedure and try to delineate more clearly what was intended by this court in the promulgation of Rule 46.

II.

Included in the opinion of the Court of Appeals setting forth the questions certified is a statement of facts. From our review of the record it appears that there is no dispute regarding any fact material to the questions certified. In summary form, the facts are:

1. United Services Automobile Association (USAA) is an inter-insurance exchange which issues insurance policies exclusively to persons who are members of the Armed Forces of the United States. USAA was the Defendant in the United States District Court for the Southern District of Mississippi and is the Appellant in the Court of Appeals.

2. USAA was and is qualified to do business in Mississippi and in fact has issued insurance policies in Mississippi.

3. USAA issued an automobile insurance policy to Col. Henry W. Boardman, a resident of Omaha, Nebraska, for a policy period covering September 15, 1978, to September 15, 1979. Henry W. Boardman was one of the Plaintiffs in the District Court and is one of the Appellees in the Court of Appeals.

4. The insurance contract was issued in Nebraska through USAA's agent in Nebraska, while Henry Boardman was stationed with the United States Air Force in Omaha.

5. The policy covered a 1975 Oldsmobile, a 1974 Ford Pinto, and a 1977 Ford Pinto, all principally garaged in Nebraska.

6. The other Plaintiff-Appellee, Joseph W. Boardman, age 19, entered Mississippi State University at Starkville, Mississippi, during the Fall and Spring semesters of the 1978-1979 term.

7. During the Fall and Spring semesters of 1978-1979, Joseph was permitted by his father, Col. Henry Boardman, to operate the Pinto automobile which was insured under the policy of insurance issued by the Defendant, USAA, in the name of Plaintiff-Appellee, Col. Henry Boardman.

8. In May of 1979, Joseph Boardman, came to Gulfport, Mississippi, to take a summer job working for his paternal uncle who owns and operates Coast Materials, located in Gulfport, Mississippi.

9. Joseph Boardman drove the Ford Pinto automobile to Gulfport and operated this automobile until his father came to Gulfport and recovered this vehicle in order to deliver the automobile to Joseph's sisters who live in Cincinnati, Ohio.

10. On June 14, 1979, Henry Boardman requested USAA to remove Joseph Boardman as a named insured on the automobile insurance policy.

11. USAA effected the deletion of Joseph Boardman on June 16, 1979.

12. On June 20, 1979, Joseph Boardman purchased a used 1970 Chevrolet Caprice automobile from Jay Jay Chevrolet, Gulfport, Mississippi.

13. An application was made by Joseph Boardman for a certificate of title and, additionally, Joseph purchased a Mississippi license tag for the Chevrolet Caprice automobile.

14. The 1970 Chevrolet was never added to the insurance contract between USAA and Col. Henry Broadman, nor was any premium paid to USAA for any coverage under that or any other insurance contract.

15. On July 8, 1979, at approximately 3:00 a.m., Joseph Boardman was injured in an accident with an uninsured motorist, David Turan, in Gulfport, Mississippi, while driving the 1970 Chevrolet.

16. The Plaintiff-Appellee, Joseph Boardman, did not receive title to the Chevrolet automobile until July 9, 1979, or one day following the accident.

17. Damages sustained by Joseph Boardman as a result of the accident of July, 8, 1979, include severe personal injuries which are undisputed.

18. The USAA policy afforded uninsured motorist coverage to all insureds under the policy but contained the following exclusion therefrom:

> EXCLUSIONS: This policy does not apply under Part IV:
> (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) *owned* by the named insured or a *relative*, or through being struck by such an automobile . . . . [emphasis added]

This clause is referred to as the "owned vehicle exclusionary clause".

19. The claim for uninsured motorist benefits arising from the accident under the USAA policy in which Henry

Boardman was the named insured, was denied to Joseph Boardman on the grounds that Joseph was driving an owned motor vehicle, which was not an insured vehicle under the subject policy, thereby being specifically excluded under the policy terms.

20. Nebraska law appears to uphold the "owned vehicle" exclusionary clause, *See Herrick v. Liberty Mutual Fire Insurance Company*, 202 Neb. 116, 118-19, 274 N.W.2d 147, 148-49 (1979); *Shipley v. American Standard Insurance Company of Wisconsin*, 183 Neb. 109, 111-12, 158 N.W.2d 238, 240 (1968).

21. The "owned vehicle" exclusionary clause does not preclude uninsured motorist coverage under Mississippi law. See *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767, 777-78 (Miss.1973).

III.

The process of adjudication, both at the trial level and at the appellate level, has a three-fold nature. The point is rather elementary, but it needs restatement here.

First is the function of *fact identification*. The court must make a determination of, and then state, the relevant factual characteristics of the particular matter at bar.

Second, the court must make a formulation in general terms of the relevant law to be applied. This is the function of *law declaration*.

Obviously, the chronological ordering of the performance of the fact identification function and the law declaration function becomes a chicken-and-the-egg proposition, for the facts help determine what rules of law are relevant, and the rules of law help determine what facts are relevant.

Third, and finally, there is the function of *law application.* This is the job of linking up the particular with the general, the facts with the law. This is the point of ultimate decision in the case.

Failure to keep these three functions distinct in mind has led to problems which we need not expound upon here. Those problems are brought to mind, however, as we confront the questions put to us by the Court of Appeals in this case, since we have been asked to advise the Court of Appeals what state's law governs the instant controversy—Mississippi or Nebraska. That is a law application question.

We recognize that the Court of Appeals is charged to ascertain just what our choice of law rules are. *See Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477, 1480-81 (1941); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4-5, 96 S.Ct. 167, 168, 46 L.Ed.2d 3, 5 (1975). By our Rule 46 we have recognized our responsibility to supply such rules when there is substantial room for doubt regarding their content. Since state law is to be applied, we recognize and appreciate the spirit of cooperative federalism implicit in the certification practice in the Fifth Circuit whatever discordant notes may be produced in a given case. We are further motivated in the case at bar by our view that the United States District Court for the Southern District of Mississippi has misunderstood and misapplied our law.

[1] The point is that our Rule 46 was adopted to enable us to answer questions related to the *law declaration* function—and that function only. This we have done in large part by the adoption of the center of gravity test. *See Craig v. Columbus Compress & Warehouse Co.,* 210 So.2d 645, 649 (Miss.1968); *Mitchell v. Craft*, 211 So.2d 509, 512 (Miss.1968). Restatement (Second) of Conflicts of Laws, §6, has long since been incorporated into our law. *See*

Mitchell v. Craft, 211 So.2d at 516; *Spragins v. Louise Plantation, Inc.*, 391 So.2d 97, 100 (Miss.1980).

Since 1968 we have refined and applied the *Craig-Mitchell* center of gravity test in a variety of factual and legal contexts in *McNeal v. Administrator of Estate of McNeal*, 254 So.2d 521, 524-525 (Miss. 1971); *Fells v. Bowman*, 274 So.2d 109, 112-113 (Miss.1973); *Dunavant Enterprises Inc. v. Ford*, 294 So.2d 788, 791-792 (Miss.1974); *Vick v. Cochran*, 316 So.2d 242, 245-248 (Miss.1975); *Spragins v. Louise Plantation, Inc.*, 391 So.2d 97, 99-101 (Miss.1980); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 457-458 (Miss. 1983). These decisions do not answer every question that may be asked about our choice of law rules–nor, in the nature of things, could they. They do, however, provide our rules with substantial flesh.

We are not insensitive to the traditional formulation of the anti-forum shopping rationale of the *Erie* doctrine–that where, as here, a federal court exercises subject matter jurisdiction solely because of diversity of citizenship, the outcome of the litigation in federal court should be

> substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.
>
> *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079, 2086 (1945).

The federal judiciary may proceed on the assumption that in such cases a district judge sits merely as another trial judge of the state. *Beasley v. Fairchild Hiller Corp.*, 401 F.2d 593, 595 (5th Cir.1968). If it does so it enforces federal rules emanating from federal policies. This state's interests,

though compatible, are not identical. Otherwise, we would inevitably find ourselves in the anomalous position of resolving controversies among parties wholly subject to the in personam jurisdiction of the federal court and in no jurisdictional sense before any court of this state. In answering the questions certified today we are aware that we come quite close to doing just that. The process of adjudication is not so amorphous that such is necessary as the only way the federal judiciary may achieve the laudable goals of *Erie*. Though subscribing to no theory of mechanical jurisprudence, we would think it ordinarily within the competence of a federal judge, given stipulated facts and eight decisions of this Court declaring and refining the applicable legal principles, to decide the case substantially the same, so far as legal rules determine the outcome of a litigation, as would the appropriate state court.

The point for the moment is simply that our interest in the protection of the integrity of the law of this state and in assuming a responsible role in cooperative federalism, all consistent with our own docket control problems, are adequately served by a restriction of our activities under our Rule 46 to the performance when properly requested of the function of declaring in general terms the controlling rules of law of the State of Mississippi.

We hope what we have said above clarifies the nature and scope of our certification process under Rule 46. We realize that the considerations stated could well lead to the conclusion that we should decline certification in this case. Indeed in all cases we retain the discretion to so decline. Still there must be some give and take, and it hardly befits our role in our constitutionally ordained enterprise of federalism to act like a stick in the mud whenever questions certified are not pure law declaration questions. In the present case, however, a combined consideration of how long

this case has been dragging on since it was originally generated by the automobile accident of July 8, 1979, coupled with the desire to proceed–and to be perceived to have proceeded–in complete good faith in a spirit of cooperative federalism, we will shed such insights as we can on the questions presented.

IV.

In 1968, this state's choice of law rules were modified to embrace the "center of gravity" concept. *Mitchell v. Craft*, 211 So.2d 509, 512 (Miss.1968); *Craig v. Columbus Compress & Warehouse Co.*, 210 So.2d 645, 649 (Miss.1968. In cases where a question is presented as to whether the substantive rules of decision should be our own or those of some other state, *Mitchell* and *Craig* committed us to a determination of which state has the most substantial contacts with the parties and the subject matter of the action.

Embracing the Restatement (Second) of Conflicts of Laws, §6, *Mitchell* enumerated a number of factors relevant to a choice of law determination. These include: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relevant interest of those states in the determination of a particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of results; (7) ease and determination in application of law to be applied. *Mitchell v. Craft*, 211 So.2d at 516; *Spragins v. Louise Plantation, Inc.*, 391 So.2d 97, 100 (Miss.1980). Evaluation and balancing of these factors has proven quite elusive.

Two nuances of our choice of law approach, important to this case, need be emphasized.

[2] First, the law of a single state does not necessarily control every issue in a given case. We apply the center of gravity test to each question presented, recognizing that the answer produced in some instances may be that the law of this state applies and on other questions in the same case the substantive law of another state may be enforceable. We note that *Fells v. Bowman*, 274 So.2d 109 (Miss.1973) has recognized that this Court is not necessarily required

> to apply the law of a single state to every facet of the case.
> 274 So.2d at 112. See also, *Vick v. Cochran*, 316 So.2d 242, 246 (Miss.1975).

Second, we recognize that there will be cases where, applying the center of gravity doctrine, we might conclude in the first instances that the law of another state should be applied. Where that law is contrary to the deeply ingrained and strongly felt public policy of this state, however, we have recognized that we may nevertheless apply and enforce this state's positive substantive law. *McNeal v. Administrator of Estate of McNeal*, 254 So.2d 521, 524 (Miss. 1971).

V.

We turn now to the specific questions put by the Court of Appeals.

QUESTION NO. 1

Would Mississippi or Nebraska law apply in construing the USAA automobile insurance contract issued to Henry Boardman; or stated differently, under the Mississippi "center of gravity" test, which state would be deemed to have the most significant contacts with the insurance policy for choice of law purposes?

A.

We regard this as a general question asking which state's law would apply to the construction of this insurance contract, absent peculiar countervailing considerations. The answer is superficially easy. The contract in question was made and entered into in the state of Nebraska. Henry Boardman at the time was a resident of Nebraska and at all times relevant hereto all insureds under the contract have been residents of Nebraska. Moreover, the insurer, USAA, was acting through a Nebraska agent. The policy covered three automobiles each of which, according to the stipulated facts before us was "principally garaged in Nebraska". The principal location of the risks insured against was in Nebraska. Mississippi's contacts with this contract and the parties are fortuitous, arising from the fact that Joseph Boardman took a summer job in Gulfport. All of this suggests that Nebraska law should apply.

In this setting, we note that we have been asked by the Court of Appeals to comment upon the relative weight given under Mississippi law to the choice of law principles found in Sections 6, 188 and 193, Restatement (Second) of Conflicts of Laws (1971). When we engage in these considerations, our problem is seen not quite so simple, although our answer–that Nebraska law applies–remains intact.

[3] As indicated above, this Court has expressly approved Restatement §6 and incorporated it into the law of this state. *Spragins v. Louise Plantation, Inc.*, 391 So.2d 97, 100 (Miss.1980); *Mitchell v. Craft*, 211 So.2d 509, 515-516 (Miss.1968). Short of authoring a treatise on the subject which would be neither helpful nor read, we will simply say that the factors enumerated in Restatement §6 will from case to case be given such relative weight as they

are entitled, consistent with the general scheme of the center of gravity test.

Restatement §188 applies to contract cases generally. In pertinent part, it provides:

> §188. Law Governing the absence of Effective Choice by the Parties
>
> * * * * * *
>
> (2) In the absence of an effective choice of law by the parties (see §187), the contracts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement §188 narrows the focus of §6. Section 188 sets forth certain principles to be applied in making choice of law determinations in contract actions generally. We have never expressly addressed Restatement §188, although it appears generally consistent with our center of gravity opinions authored in the context of actions arising ex contractu. *See Dunavant Enterprises, Inc. v. Ford,* 294 So.2d

788, 791-92 (Miss.1974); *Craig v. Columbus Compress & Warehouse Co.*, 210 So.2d 645, 648-49 (Miss.1968).

[4] A dissertation on Restatement §188 would be less than helpful at this point as this is an action on the uninsured motorist feature of a liability insurance contract and Restatement §193 provides the starting point for the choice of law inquiry in such cases.

Restatement §193 provides:

> Contracts of Fire, Surety or Casualty Insurance
>
> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the transaction and the parties, in which event the local law of the other state will be applied.

[5] To begin with, we regard Restatement §193 as among the choice of law rules applicable in this state. We have no prior cases construing §193. Nevertheless, having embraced the general center of gravity test found in Restatement §6 in *Mitchell* and *Spragins*, we perceive no reason why when it comes to actions on insurance contracts we should chart a separate course. Restatement §193 presents a fair and enlightened set of principles and we adopt them.

The central thrust of Restatement §193 is that the law applicable in actions on insurance contracts (other than those providing life insurance) should the law of the state the parties understood was to be the principal location of the risk. Note that the phrase "principal location" is used, not "exclusive location" or other like phraseology. This choice of wording no doubt reflects the reality that choice of law questions do not arise unless at least two states have some arguable basis for application of their law.

[6] In the case of an automobile liability insurance policy, issued to a citizen of Nebraska covering his household, it seems inescapable, as we have indicated above, that the principal location of the risk is in the State of Nebraska. This is particularly so where, as here, the policy covers three automobiles each of which, according to the stipulated facts before us, was "principally garaged in Nebraska".

Restatement §193 announces a general rule that, where the greater portion of the risk be in a particular state for the major portion of the insurance period, the risk's principal location is the most important choice of the applicable law. Restatement (Second) of Conflicts of Laws §193 comment b(1971). On the other hand, comment d to Restatement §193 recognizes that

> There may also be occasions when following the issuance of the policy the principal location of the risk is shifted to some other state. In such a situation, this other state will have a natural interest in the insurance of the risk and it may be that its local law should be applied to determine at least some issues arising under the policy. In any event, application of the local law of the other state

> would hardly be unfair to the insurance company, at least with respect to some issues, if the company had reason to foresee when it issued the policy that there might be a shift to another state of the principal location of the risk.

[7] The specific risk at issue here is that Joseph W. Boardman, or some other "insured" under the policy, might become involved in an automobile accident with a negligent uninsured motorist. The principal location of that risk, at least insofar as Joseph W. Boardman is concerned, was in Mississippi on July 8, 1979, and had been in Mississippi for the greater part of the immediately preceding ten months. From this point of view there would be force to the argument that under Restatement §193 Mississippi law should furnish the rule of decision regarding the insurer's liability.

[8-10] The outcome-determinative question here, however, appears to be one of coverage. The question is whether Joseph W. Boardman is an "insured" under the policy having any right to sue under the uninsured motorist coverage of his father's policy at all. This is a matter having little to do with the location of the risk. This coverage question invokes the exception to the general "principal location of the insured risk" rule of Restatement §193. In our view the coverage issue tendered here is an issue unrelated to the insured risk, as a result of which the choice of law determination must be made by reference to the more general principles of Restatement §6 and §188, for here we are concerned with the meaning of the insurance contract on the question of what individuals would be covered as "insureds". When Henry W. Boardman, then a resident of Omaha, Nebraska, effected automobile insurance coverage in Nebraska through USAA's Nebraska agent, the only

reasonable expectation the parties could have had was that the question of what members of the Boardman family would be protected would be determined by reference to Nebraska law.

Focusing upon the criteria of Restatement §188(2):

(a) the place of contracting was in Nebraska,

(b) the place of negotiation of the contract was in Nebraska,

(c) the place of performance was substantially in Nebraska,

(d) the location of the subject matter of the contract, i.e., the *principal* location of the risks insured against, was in Nebraska (although the specific risk that Joseph W. Boardman would be involved in an accident with a negligent uninsured motorist–only one risk among the many arguably insured against by the policy–was on July 8, 1979, in Mississippi), and

(e) the residence of Henry W. Boardman was Nebraska while USAA, though not a Nebraska corporation, acted through a Nebraska agent.

[11] Eschewing application of any mathematical or otherwise mechanical process to an evaluation of the §188 factors, we regard it as clear that they militate in favor of the application of Nebraska law to the outcome-determinative question presented in the case at bar.

B.

We have considered carefully the Mississippi contacts

suggested, first, in the opinion of the District Court, at pages 7-8, and second in the Boardman's brief in the Court of Appeals. In each instance a failure to perceive two important distinctions is apparent. In considering the questions certified and taking liberties to which we are entitled, we submit the following observations, hoping they will be of value.

We are *not*, for present purposes, concerned with the tort claim of Joseph Boardman against the uninsured motorist. No doubt that tort claim should be adjudicated according to substantive Mississippi law, although this result would not inexorably follow if Joseph Boardman and the uninsured motorist had both been residents of Nebraska. *See Mitchell v. Craft*, 211 So.2d 509, 514 (Miss.1968) (Mississippi law applied to tort action by a Mississippian against a Mississippian arising out of accident occurring in Louisiana).

Moreover, we are *not* concerned immediately with the risk that Joseph W. Boardman would encounter a negligent uninsured motorist. Our focus rather is upon the question whether Joseph W. Boardman was one of the "insured's" under the policy entitled to claim the benefits provided thereunder, whatever those benefits might be.

[12-13] Second, there are important, though because subtle often missed, distinctions between the factors that govern adjudications of questions of in personam jurisdiction, venue and choice of law. The correct pattern of analysis in each of these areas of inquiry is separate and distinct from the other two. As here, the distinction is often blurred. That in an action arising out of a tort committed in Louisiana, a Louisiana defendant may have sufficient contacts with Mississippi to render that defendant amenable to suit here does not necessarily mean that Missis-

sippi substantive law governs the substantive rights and liabilities of the parties. *Administration of Tulane Educational Fund v. Cooley*, 462 So.2d 696, 701-702 (Miss.1984). Conversely, that California has sufficient contacts so that its substantive law should govern a child support modification action does not necessarily render a New York defendant amenable to suit in California. *Kulko v. Superior Court*, 436 U.S. 84, 98-101, 98 S.Ct. 1690, 1699-1701, 56 L.Ed.2d 132, 145-146 (1978).

[14] The Mississippi contacts suggested by the Boardmans are

> (1) Shortly before the accident, the Plaintiff-Appellee Joseph Boardman had been a full time student at Mississippi State University.

We regard this factor as relevant to resolution of the choice of law question in this contract only insofar as it may suggest the "principal location" of the risk. Because the question at issue does not involve the scope of the risk insured against but rather who are the parties entitled to benefits under the policy, this factor is essentially meaningless. Restatement (Second) of Conflicts of Laws § 188(2) (1971).

> (2) At the time of the accident, Joseph Boardman was temporarily residing in Gulfport, Mississippi, working to earn money so that he could return to Mississippi State University in the fall.

[15-22] The same observations made with respect to (1) above apply here. This factor is of no substantial significance for adjudication of the coverage question presented.

> (3) Approximately a week before the accident, Joseph Boardman had purchased a vehicle in the State of Mississippi and further purchased a Mississippi tag for said vehicle.

Again we fail to see how this factor informs the particular choice of law inquiry before the Court. Joseph's purchase of a vehicle in Mississippi and the purchase of a Mississippi tag are the factors which simply have nothing to do with the coverage question in issue, unless, of course, Joseph is somehow suggesting that he has become a resident of Mississippi. This, of course, would produce a threshold disaster for Joseph's claim if it should be sufficient to exclude him from the Henry Boardman household. For purposes of answering the choice of law questions before us today, we proceed with confidence that at all relevant times Joseph Boardman, as well as Henry Boardman, was a resident and citizen of Nebraska.

> (4) The accident subject to this litigation occurred in Gulfport, Mississippi.

This could be a factor of controlling significance for in personam jurisdiction purposes under our long-arm statute. Miss.Code Ann. §§ 13-3-57 to -63 (Supp.1984). If we were concerned with ascertaining the substantive rules of law applicable to the determination of the tort claim by Joseph Boardman against the uninsured motorist, this factor would be of enormous significance. On the coverage question preliminary to presentation of an uninsured motorist claim against USAA, however, we regard it as fortuitous and hence irrelevant.

> (5) All witnesses to the accident reside in the State of Mississippi.

This factor is irrelevant to the particular choice of law inquiry at issue. On the other hand, it would be of substantial relevance if we had a venue inquiry before us and would certainly be of some importance in the determination of the in personam jurisdiction amenability question.

> (6) At the time of the filing of this litigation, the Plaintiff-Appellee Col. Henry Boardman moved back to the State of Mississippi, so at the time of filing, both Plaintiffs-Appellees resided in the State of Mississippi.

The suggestion that plaintiffs can change the substantive law according to which a particular action must be adjudicated by changing their citizenship prior to filing suit simply won't wash. The choice of law inquiry must relate to the times relevant to the transaction or occurrence giving rise to the claim ab initio. Where the Boardmans lived at the time suit was filed would, however, be relevant to the subject matter jurisdictional inquiry under 28 U.S.C. § 1332 (Supp.1985). *See Baker v. Keck*, 13 F.Supp. 486, 488-89 (E.D.Ill.1936). This factor would also be relevant to a venue inquiry.

> (7) At the time of the accident, the Defendant-Appellant United Services Automobile Association was qualified to do business in the State of Mississippi and in fact issued insurance policies in the State of Mississippi.

Again this is a factor wholly unrelated to our choice of law inquiry. That USAA was qualified to do business in Mississippi and in fact had issued insurance policies in Mississippi would, of course, conclusively establish its amenability to suit in this state. Where that suit arises out of a contract issued by USAA in Nebraska through a Nebraska agent to

Nebraska residents, however, this factor fades into insignificance in the context of our efforts to identify the rules by which the validity of owned vehicle exclusionary clause must be determined.

> (8) The Defendant-Appellant United Services Automobile Association is an inter-insurance exchange which exclusively issues insurance policies to persons who are actually members of the United States Armed Services or who have been enlisted in the Armed Forces of the United States and necessarily this Defendant-Appellant could expect its policyholders to be quite mobile and it would be quite unrealistic and unfair to restrict questions concerning coverage to the state where the insurance policy was originally issued.

Again, we have a factor quite important for in personam jurisdiction and venue purposes but wholly irrelevant for choice of law purposes.

[23] An additional factor considered by the District Court was that the uninsured motorist tort feasor was also a resident of Mississippi. Here again we have a factor influencing venue. On the other hand, we are wholly unable to see how the residence of the uninsured motorist could have anything to do with the determination of the applicable rules of substantive law to govern the contract claim by the Boardmans against USAA, nor for that matter would this factor have any relevance to the in personam jurisdiction inquiry.

[24] The error of the District Court's analysis-its blurring of the distinctions between the choice of law inquiry

and the in personam jurisdiction inquiry—is made apparent on page 8. There the District Court states:

> Although the policy of insurance was issued in Nebraska, by virtue of the nature of USAA's issuance of policies to members of the Armed Forces, they could and should expect those insured persons to be transient, and, therefore, USAA could anticipate being haled into court in a foreign jurisdiction.

This notion, however, has nothing to do with choice of law questions. Rather, it derives from *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980). The question in *Worldwide Volkswagen* was whether a nonresident defendant was constitutionally amenable to suit in a foreign jurisdiction. Whether that defendant could reasonably anticipate being haled into court in the foreign jurisdiction was held to be a factor of primary importance. Nothing in *Worldwide Volkswagen* or in any other case correctly analyzing the sort of question we have here suggests that anticipation of being haled into court in a foreign state is a factor determinative of choice of law questions.

> The District Court continues
> To require every insured who filed a claim against USAA to litigate that claim in the state in which the policy was issued, notwithstanding other relevant factors which the court should consider, would put an onorous burden on those claimants and would fly directly in the fact of the "center of gravity" test.

[25] Again, the District Court confuses amenability to suit in a foreign forum with choice of law. For the reason

recited, USAA was amenable to in personam jurisdiction in Mississippi and particularly in the United States District Court for the Southern District of Mississippi. Even if USAA had not formally qualified to do business in this state, it could have been subjected to in personam jurisdiction here. On the other hand, once USAA's amenability to suit in Mississippi is established, there is no injustice or hardship worked upon insureds by requiring them to litigate *in this state* according to substantive rules emanating *from the state in which the policy originally issued.*

QUESTION NO. 2

> Would Mississippi or Nebraska law govern the validity of the uninsured motorist exclusionary clause; or stated differently, if Nebraska law is held to govern the insurance contract, does Mississippi public policy prevent the enforcement of the exclusionary clause?

As we all know, this Court takes a dim view of insurer efforts to exclude cases and persons from coverage of the uninsured motorist provisions of an automobile insurance policy. *See, e.g., State Farm Mutual Auto Insurance Co. v. Nester*, 459 So.2d 787, 789-93 (Miss.1984); *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767, 777-78 (Miss.1973). If this action had been brought in a Mississippi court on a contract made between Mississippi insureds and a resident or nonresident insurer acting through a Mississippi agent, there could be little doubt of the outcome.

What we have here, however, is a non-Mississippi insurer making a contract in Nebraska through a Nebraska agent with a Nebraska insured whose son decides to take a summer

job in Gulfport, Mississippi. We also have here an action brought in a United States court, not a Mississippi court, although the significance of this fact is not for us to determine.

This question is not, what would be the public policy of this state regarding an exclusion such as that claimed here were the insureds Mississippians. Rather, the question is whether we have a public policy which is so strong that it would override the reasonable expectation (if they thought about it) of both USAA and Henry Boardman that at the very least the coverage questions arising with respect to their contract would be governed by the law of Nebraska. We say all of this in the context of *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767 (Miss. 1973), which holds that enforcement of an owned vehicle exclusionary clause comparable to that with which we are here concerned, where included in a policy issued in this state, is precluded under our Uninsured Motorist Statute. Miss.Code Ann. § § 83-11-101 *et seq.* (1972).

[26] As indicated above, one of the important principles we enforce is that no foreign state's substantive law will be enforced in courts of this state where to do so would be offensive to the deeply ingrained or strongly felt public policy of the state. In this context, note that *Mitchell v. Craft*, refused to enforce the Louisiana contributory negligence rule in the face of this state's longstanding comparative negligence statute. 211 So.2d at 513-16. Similarly, *McNeal v. Administrator of Estate of McNeal*, refused to allow enforcement in this state of the Louisiana direct actions statute in the face of the strong public policy of this state precluding intra-family tort actions. 254 So.2d at 524.

On the other hand, we have recognized that highway safety regulations of the State of Louisiana may be enforced

in Mississippi, even though our rules differ from those in Louisiana. *Fells v. Bowman*, 274 So.2d 109, 112-113 (Miss. 1973). Moreover, we have recognized, in guest passenger tort action, enforceability in the courts of this state of the Alabama guest statute even though Mississippi has no similar statute. *Vick v. Cochran*, 316 So.2d 242, 246-247 (Miss. 1975). Beyond that we have recognized that the real estate property laws of other states may be enforced in our courts. *Spragins v. Louise Plantation, Inc.*, 391 So.2d 97, 99-100 (Miss.1980); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 457-458 (Miss.1983).

Further reflection suggests the need for clarification and refinement of this public policy exception to our choice of law rules. We assume that there are no rules of law extant in this state which would be contrary to public policy. An enactment of the legislature is said by definition to express the public policy of the state. We do our dead level best on this Court to assure that the common law rules emanating from our adjudication are consistent with the clear public policy of the state. We, nevertheless, have and enforce choice of law rules which from time to time allow the positive substantive law of this state to be set aside in favor of the laws of another state possessing greater contacts with the parties and the action.

Every choice of law problem, by definition, arises out of a situation where the substantive law of the competing state differs from that of this state. Because of this and because every law of this state presumably reflects the public policy of this state, we are caught in a Catch-22. The way out is recognition that some of our laws reflect public policies which are more fundamental and more inviolable than others. Some of our laws reflect public policies more strongly felt and more deeply ingrained than others. For example, Mississippi's comparative negligence and intra-family tort

immunity rules reflect longstanding public policies that may be said to be fundamental. Enforcement of the contrary rules proposed in *Mitchell* and *McNeal* would be offensive to our sense of justice. On the other hand, we can hardly say a miscarriage of justice would attend enforcement of Louisiana highway safety laws when a accident occurs in Louisiana as in *Fells v. Bowman*, nor would injustice attend enforcement of the Alabama guest passenger statute which, even though we have not enacted a like statute, reflects a core of common sense. Easiest of all are our cases where title to properties in another state are affected and where we recognize that the property laws of the foreign state involved should be enforced for by definition the real property laws of this state have no application to real property not situated within this state.

[27] We recognize that no clear line can be drawn between cases such as *Mitchell* and *McNeal*, on the one hand, and *Fells* and *Vick*, on the other hand. We likewise recognize that in deciding each new case a judgment call is necessary. Still it seems clear to us that the rule of law emanating from *Lowery* though reflective of the public policy of this state, is not one expressive of a public policy so strong that under these facts a countervailing Nebraska rule should be ignored. This particularly so when we recall that application of the factors listed in Restatement § 188(2) point so strongly to Nebraska as the state which ought to furnish the rule decision governing adjudication of the coverage question here presented.

When all is said and done, we are concerned with an insurance contract made and entered into in Nebraska between a Nebraska insured and nationwide insurer acting through a Nebraska agent. However public policy considerations prevailing in this state may affect an insurance contract written in Mississippi, we must in fairness recognize

that we have no substantial interest in the upholding of the public policy of this state, manifest through our Uninsured Mororist statute, when the question is: who is an insured under a Nebraska insurance contract. This is particularly so in view of the fact that the party seeking to recover under the insurance contract was at the controlling time not a resident of this state. Accordingly, we advise the Court of Appeals that there is no public policy in this state that would preclude enforcement of the exclusionary clause of this insurance contract.

QUESTION NO. 3

> Would Mississippi or Nebraska law govern the issue of vehicle ownership, or stated differently, would Mississippi under its "center of gravity" test consider Mississippi or Nebraska to have the most significant contacts for the purposes of establishing the law governing vehicle ownership?

As indicated above, we apply the "center of gravity" test to each issue. That other issues may be determinable by reference to Nebraska law does not necessarily mean that all issues in the case are so determinable. The rights and liabilities of Joseph Boardman and the uninsured motorist, for example, are surely determinable by reference to Mississippi substantive law.

[28] The vehicle ownership question in this case is one of contract construction. It concerns the 1970 Chevrolet Caprice automobile purchased by Joseph W. Boardman in Gulfport, Mississippi, on June 20, 1979. The automobile was being operated in Mississippi at the time of the accident. Hence, Mississippi has the most significant contacts with regard to the vehicle ownership issue. If this action were

before a court of competent jurisdiction of this state, the positive law of Mississippi would be enforced regarding the construction and application of the owned vehicle clause in the USAA automobile insurance contract.

CERTIFIED QUESTIONS ANSWERED

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* Footnotes omitted throughout Appendix B.

APPENDIX E

Joseph BOARDMAN and Henry Boardman,
Plaintiffs-Appellants,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant-Appellee.

No. 83-4310.

United States Court of Appeals,
Fifth Circuit.

Aug. 19, 1985.

Appeal from the United States District Court for the Southern District of Mississippi; Walter L. Nixon, Jr., Chief Judge.

Before BROWN, GEE, and WILLIAMS, Circuit Judges

JOHN R. BROWN, Circuit Judge:

This diversity case returns to us after certification and answer from the Mississippi Supreme Court. On September 14, 1984, we requested the parties to develop a common certificate of the issues. *Boardman v. United Services Automobile Association*, 742 F.2d 847 (5th Cir.1984). On October 23, 1984, we certified this case to the Mississippi Supreme Court. *Boardman v. United Services Automobile Association*, 763 F.2d 663 (5th Cir.1984). By decision on May 22, 1985, the Mississippi Supreme Court has answered. 470 So.2d 1024 (Miss.1985). The facts and procedural history are amply set forth in the above three decisions

and call for no further recitation here. For our present purposes, it suffices to remand this case to the district court with instructions for it to enter judgment consistent upon the principles elucidated by the Mississippi Supreme Court:

(1) Nebraska law governs the construction of the United States Automobile Association (USAA) policy.

(2) Nebraska law governs application of the owned motor vehicle exclusion of Henry Boardman's policy.

(3) Mississippi law governs the status of the vehicle as an owned motor vehicle under the policy.

The Mississippi Supreme Court has made it clear that the exclusionary clause of the USAA policy was triggered and that there was no coverage for the injuries suffered by Joseph Boardman.

Appellee's full faith and credit contentions are without merit and we do not address them in this litigation which has been protracted for nearly six years.

REMANDED WITH INSTRUCTIONS.

NO. 85-468 (2)

Supreme Court, U.S.
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OCT 17 1985
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH BOARDMAN and HENRY BOARDMAN,
Petitioners

versus

UNITED SERVICES AUTOMOBILE ASSOCIATION
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JURISDICTIONAL RESPONSE

The Petitioners fail to assert any special or important reason for this Court's review as required by Supreme Court Rule 17. As amply reflected in the Petition for Writ of Certiorari, there is no substantial federal question presented for review.

STATEMENT OF THE CASE

The facts of this litigation are undisputed and are set forth in a stipulation between the parties contained in (App. 36-39), to the Petition for Certiorari.

On October 25, 1982, the District Court for the Southern District of Mississippi, applied Mississippi law to the construction of Respondent's contract of insurance issued in Nebraska to a Nebraska resident. The Respondent filed an appeal to the United States Court of Appeals, Fifth Circuit, and on October 23, 1984, the Court of Appeals certified stipulated issues to the Mississippi Supreme Court for resolution. The Supreme Court of Mississippi on May 22, 1985, unanimously answered the questions certified, thus holding that the District Court erred in applying Mississippi law to the non-forum contract of insurance. The decision was subsequently adoped by the Fifth Circuit on August 19, 1985. Being aggrieved over the decision, the Petitioners are now attempting to make an untimely and unmeritorious constitutional argument for the issuance of Writ of Certiorari, in order to escape final judgment which is legally, as well as, constitutionally inevitable.

RESPONSE TO ARGUMENT I

The Petitioners' contention that the Mississippi Supreme Court can not reach a legal conclusion contrary to that of the District Court without first holding the latter's factual findings are clearly erroneous under Rule 52(a) Fed. R. Civ. P., is inappropriate from a procedural standpoint, erroneous upon legal analysis and insufficient as a jurisdictional ground for resolution by this Court. First, the choice of law decision of the Mississippi Supreme Court involves application of law to certain stipulated facts provided by the parties. (App. 46-48) Therefore, the Mississippi Court was not engaged in any fact-finding activity, but merely one involving law application. The case upon which the Petitioners rely makes clear that conclusions of law and mixed questions of law and fact are not governed by Rule 52(a). *Pullman - Standard, Inc. v. Swint*, 456 U.S. 273, 287-288 (1982).

Secondly, the Mississippi Court's motivation for reversal was "that the United States District Court for the Southern District of Mississippi has misunderstood and misapplied our law." (App. 47) Again, *Swint* mandates affirmance, not reversal. In holding that Rule 52 does not apply to conclusions of law, this Court affirmed the view "that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Id.* at 287

Even though the District Court disposed of the case now on appeal by summary judgment thus incorporating findings of fact and conclusions of law in the lower court's order, the universal rule is that such findings are not protected by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). 9 C. Wright and A. Miller, Federal Practice & Procedure §2575 (1971); *New York Life Ins. Co. v. Baum*, 707 F.2d 870,871 (5th Cir. 1983); *Gaines v. Haughton*, 645 F.2d 761,

764 (9th Cir. 1981) cert. denied 454 U.S. 1145 (1982); *Williams v. Borden, Inc.*, 637 F.2d 731, 739 (10th Cir. 1980); *Tygrett v. Washington*, 543 F.2d 840, 844 (D.C. Cir. 1974).

In conclusion, certiorari is inappropriate on this issue since the Mississippi Supreme Court merely corrected the District Court's misunderstanding and misapplication of state law, a task which did not require the Mississippi Court to engage in any fact-finding activity. Even if this were not so, the weight of authority accords no Rule 52 protection to the findings of fact on a summary judgment motion.

RESPONSE TO ARGUMENT II

The premise that the Mississippi Supreme Court's choice of Nebraska insurance law to govern the validity of the coverage exclusion offends the Full Faith and Credit clause, Article IV, Section I, is flawed at its core. A violation of the Full Faith and Credit clause occurs only when the forum state refuses to respect the laws of a non-forum state, yet the complaint here is that the forum state enforced non-forum law to the exclusion of its own law. In each case which Petitioners rely, the Full Faith and Credit challenge was mounted by the party in the respondent's position urging the application of the law of a state other than the forum, arguing that the failure to apply the non-forum's law violated his rights under the full faith and credit clause. *Phillips Petroleum v. Shutts*, 53 USLW, 4879 (1985), (Phillips seeking application of Texas and Oklahoma law in Kansas forum); *Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981), (Allstate urging enforcement of Wisconsin law in Minnesota forum); *John Hancock Mutual Life Insurance Company v. Yates*, 299 U.S. 178 (1936), (Insurer asserting New York law applies in Georgia forum); *Home Insurance Company v. Dick*, 281 U.S. 397 (1930), (Mexican law

interposed in Texas forum). In short, this argument could logically have been asserted only by the respondent herein.

The due process attack on the decision below is, likewise, unfounded. This court's review of state choice of law decisions does not extend to whether a particular state court's choice of law analysis is preferred or whether this court would make the same choice of law decision if sitting as a state court. *Hague, supra*, at 307. Rather, this court's sole function in reviewing such decisions is "to determine whether the [state] Supreme Court's choice of . . . law . . . exceeded federal constitutional limitations." *Id.*

Implicit in this restriction is the long standing recognition that a state court faced with a given set of facts or an issue within the lawsuit may constitutionally apply the law of more than one jurisdiction. *Id.* So long as the minimum constitutional requirements are met, the United States Supreme Court intrudes no further to . . . "insure that the state courts correctly apply whatever choice of law rules they have themselves adopted", *Id.* at 322, (Stevens, J. concurring), because this is "purely a question of local common law . . . with which this court is not concerned." *Kryger v. Wilson*, 242, U.S. 171, 176 (1960).

This court traditionally reviews the constitutional sufficiency of a choice of law decision under the due process clause and the full faith and credit clause by examination of "the contacts of the state whose law was applied with the parties and with the occurrence or transaction giving rise to the litigation." *Hague, supra*, 308. The modest restrictions imposed by Due Process and Full Faith and Credit require:

> that for a state's substantive law to be selected in a constitutionally permissible manner,

> that state must have a significant contact or aggregation of contacts, creating state interest such that the choice of its own law is neither arbitrary nor fundamentally unfair. *Shutts*, *supra*, 4885 (quoting *Hague*, *supra*, 312-13).

Contrary to the Petitioners' assertion, the contacts listed below more than meet the minimum constitutional requirements for applying Nebraska law to interpret the coverage under this policy:

1. The place of contracting was in Nebraska.

2. The place of performance was substantially in Nebraska.

3. The principal location of the risks insured against, i.e., where the cars were garaged, was in Nebraska.

4. The residence of Petitioner Henry Boardman was in Nebraska.

5. USAA did business in Nebraska.

In addition, the outcome determinative issue–whether Petitioner Joseph Boardman was an "insured" under the policy having any right to sue under the uninsured motorist provision of the policy–requires him to maintain that he was a resident of the same household as his father, in Nebraska. (App. 56-57). The presence of a non-forum insurance policy covering risks and residents primarily located in the non-forum has long been recognized by this Court as sufficient contacts under the Due Process and Full Faith and Credit clause to apply non-forum law. *Dick*, *supra*, at 407-08;

Yates, *supra*, at 182. The above aggregation of contacts creates a substantial state interest in Nebraska such that interpreting an insurance contract covering residents and risks pricipally located in Nebraska in accordance with that states's public policy, cannot be termed arbitrary nor fundamentally unfair.

A cursory comparison of the cases cited by the Petitioners for reversal to the case at bar reveals instead that they support the decision below. *Dick* and *Yates*, like the case at bar, involve insurance policies issued in the non-forum state covering risks located in the non-forum. In both cases, this Court reversed application of forum law which " . . . rested exclusively on the presence of one non-significant forum contact . . .", *Hague*, *supra*, at 309, namely, the Plaintiff's post-occurrence change of residence to the forum.

The Petitioners incorrectly assert that *Hague*, in effect, overruled *Dick* and *Yates* to hold "that a post-occurrence change of residence to the forum may be sufficient in and of itself to confer power on the forum state to choose its law." (Pet., 16). In fact, the plurality opinion said to the contrary that such a factor was " . . . insufficient in and of itself to confer power on the forum state to choose its law . . ." *Hague*, *supra*, 319. (Emphasis added). Justice Stevens, although concurring in the Judgment, went further to agree with the dissenters that this factor was constitutionally irrelevant. (Cf. *Hague*, *supra*, at 331, (Stevens, J. concurring) and 337, (Powell, J. dissenting). That this court has " . . . generally accorded such a move little or no significance . . ." was restated only last term in *Shutts*, *supra*, 4885.

The contacts proposed by the Petitioners in support of applying Mississippi law to this case were properly dispensed by the Mississippi court as relevant not to choice of law, but *in personam* jurisdiction and venue. (App. 57-64).

This Court used this distinction last term to reject an attempt by Kansas to use " . . . the assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law." *Shutts*, *supra*, at 4885.

Even assuming *arguendo* that the Boardmans' post-accident removal to Mississippi, together with other factors, justified in Due Process terms, the application of Mississippi law to this case, they have no Federal Due Process right to that result. Where the facts would permit enforcement of the law of more than one jurisdiction, the choice is purely a question of local common law. *Kryger*, *supra*, at 176. Having met the Due Process test through non-forum contacts similar to *Dick* and *Yates*, the decision of applicable law is left up the forum's highest court. *Hague*, *supra*, at 307.

The Petitioners make much of the Mississippi Supreme Court's inadvertent and understandable inclusion of the "Nebraska agent" factor among those supporting Nebraska law. Yet, nowhere in the entirety of the court's opinion is that factor accorded any greater significance than the other five factors involved, nor does the court indicate that it was in any way decisive or outcome–determinative. Consequently, in view of the significant other contacts noted by the court with Nebraska, this factor does not give rise to a constitutional defect.

Where, as here, the aggregation of contacts meets constitutional muster, this court's function is concluded, since the relative importance of particular facts to a given state choice of law question presents no claim of federal constitutional significance. This Court should rest assured that the forum's highest court would not lightly subordinate its own public policy to that of a sister state without examining both the forum and non-forum contacts carefully and sensi-

tively. While the decision below reveals unusual scholarship and legal analysis, in the context of decisions from other state courts, it is an ordinary and accepted result. See *Travelers Indemnity Co. v. Sterns*, 116 N.H. 285, 358 A.2d 402 (1976), (Policy issued in Massachusetts to Massachusetts resident; accident in New Hampshire; Massachusetts law applied to construction of policy); *Lewis v. American Family Insurance Group*, 555 S.W.2d 579, (Ky. 1977), (Policy issued in Indiana to Indiana resident covering vehicles garaged in Indiana; accident in Kentucky; Indiana law applied to construction of policy).

In sum, the Petitioner's Full Faith and Credit argument is an illogical attempt to put themselves in the shoes of the Respondent. The Mississippi Supreme Court relied upon a constitutionally approved aggregation of non-forum contacts to apply non-forum law, and its treatment of the factors relied upon by the Petitioners accords with an unbroken line of authority from this Court. Clearly, no issue of broad constitutional significance is raised.

CONCLUSION

It is respectfully suggested by the Respondent that a review and examination of the opinion of the Mississippi Supreme Court answering the certified questions, reveals immediately its constitutional sufficiency under the Full Faith and Credit and Due Process clauses. The decision of the Mississippi Supreme Court is amply supported by an aggregation of contacts with Nebraska by the parties and the occurrence or transaction sufficient to pass constitutional muster. Respondent strongly urges this Court to afford to the Mississippi Supreme Court that degree of respect to which it is entitled and to uphold its well reasoned, fair and constitutionally sound decision solicited on certification. Since there is no substantial federal question involved

for review, certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BILLY W. HOOD, do hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to the Honorable Ben F. Galloway, at his usual mailing address of Post Office Box 218, Gulfport, Mississippi 39502.

SO CERTIFIED this 16th day of October, 1985.

BRYAN, NELSON, ALLEN,
SCHROEDER AND COBB

BY: Billy W. Hood jma
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